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International Fraud & Asset Tracing

Switzerland
Law and Practice

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Law and Practice

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1. FRAUD CLAIMS

1.1 General Characteristics of Fraud Claims

In Switzerland, the concept of fraud carries a predominantly criminal connotation, as an offence punishable under the Swiss Criminal Code (SCC). Beyond this strict definition of fraud, however, a number of other causes of action available under Swiss law also include components of fraudulent and/or injurious conduct. Below we briefly outline the various key avenues available to a victim of such fraudulent behaviour under Swiss law.

Causes of Action Arising out of Criminal Conduct

Criminal fraud and related offences

Fraud is a criminal offence punishable under Article 146 SCC. Fraud requires four key elements:

- deceit;
- astute or malicious conduct;
- intent with the objective of unlawful self-enrichment; and
- a mistake on the victim's part, causing it to make a self-harming disposition of assets.

These conditions require all of the following elements.

- First, the perpetrator must deceive the victim, eg, by making false statements, concealing true facts or reinforcing the victim's mistaken belief.
- Second, the perpetrator must act astutely or maliciously. This is the case where the perpetrator relies on a web of lies, fraudulent manoeuvres or the staging/enacting of falsehoods in order to deceive the victim. Astute or malicious conduct is also involved where the perpetrator prevents the victim from verifying false information or where the victim cannot reasonably be expected to verify the information it is provided with, given, for example, the relationship of trust or express reassurances from the perpetrator. On the other hand, malicious or astute conduct may be denied where the victim could have reasonably undertaken verifications but failed to do so.
- Third, the perpetrator must act wilfully and with the intent of unlawfully securing financial gain for itself or a third party.
- Lastly, the fraud must induce a mistake on the victim's part and cause the victim to act to the detriment of its own financial interests or those of a third party, thereby suffering damage.

The offence of fraud can be committed in the context of international commercial or business transactions, eg, where a party knowingly commits to an agreement with no intention of honouring it or induces its contracting party to contract on false pretences. As a criminal offence, fraud must, however, be distinguished from the mere failure to perform a contract, in which case liability is generally contractual, not tortious.

In addition to the strict notion of fraud, other criminal offences applicable in the business or commercial context may also include a certain degree of fraudulent and/or injurious conduct, such as (among others):

- forgery of documents (Article 251 SCC);
- criminal mismanagement (Article 158 SCC) and misappropriation (Article 138 SCC); and
- maliciously causing financial loss to another (Article 151 SCC).

Under Swiss law, there is no separate charge of conspiracy to defraud, but several co-perpetrators to a fraud offence as well as aiders and abettors ("accomplices" and "instigators" in Swiss legal terms) are, as a rule, prosecuted together

and may be held severally and jointly liable for civil compensation (see **1.3 Claims against Parties Who Assist or Facilitate Fraudulent Acts**).

Liability in tort

The above criminal offences can give rise to civil compensation under tortious liability (Articles 41 et seq of the Swiss Code of Obligations – SCO). Liability in tort depends on four cumulative requirements, for which the claimant bears the burden of proof:

- unlawful conduct by the perpetrator;
- damage suffered by the victim;
- a causal link between the conduct and the damage caused; and
- the fault of the perpetrator (eg, breach of a duty of care).

The victim of a criminal offence may seek the recovery of assets and/or compensation for damages suffered as a result of the criminal offences listed above, either in the framework of a criminal investigation or by way of an action filed in the civil courts (for the advantages of both options, see **2.5 Criminal Redress**).

Causes of Action Arising out of Contractual Fraud

In the contractual context, Swiss law provides the concepts of wilful (or fraudulent) misrepresentation and of pre-contractual liability, which both arise specifically in connection with the conclusion of contracts. Moreover, where fraudulent conduct arises in relation to an existing contract between the parties, it can give rise to contractual liability.

Wilful misrepresentation

Under Article 28 SCO, wilful (or fraudulent) misrepresentation takes place where a person intentionally creates or exploits a mistake and induces its contracting partner to enter into the contract on the basis of this mistake. Wilful misrepresentation depends on three key requirements, for which the claimant bears the burden of proof.

- An act of intentional or wilful misrepresentation, which includes making false statements, reinforcing the victim's mistaken belief or concealing true facts that the person in question had a duty to reveal.
- A mistake on the part of the victim, which induces the victim to enter into a contract.
- A causal link between the act of misrepresentation and the conclusion of the contract (ie, the victim would not otherwise have concluded the contract or would not have contracted on the same terms).

A victim of wilful misrepresentation may choose from several remedies.

- First, the victim can invalidate the contract as null and void. On this basis, they can claim restitution of any sums paid, based on a claim for unjust enrichment (Article 62 SCO), and claim restitution of any assets/property unduly transferred (see **1.5 Proprietary Claims against Property**). The victim can also seek compensation in tort for damages suffered.
- Alternatively, the victim can choose to maintain and honour the contract, but still seek compensation in tort for damages suffered as a result of the misrepresentation.

Similar avenues are available to parties who were induced to enter into a contract on the basis of a material mistake or duress.

Culpa in contrahendo

In addition to wilful misrepresentation, liability can also arise out of precontractual obligations (culpa in contrahendo, based on the principle of good faith). Under Swiss law, parties must negotiate in good faith and in accordance with their true intentions. A party who intentionally gives inaccurate advice or information, fails to

disclose facts of reasonably foreseeable importance to the contracting party or otherwise creates certain expectations leading the other party to make subsequent arrangements can, under certain circumstances, be held liable for the resulting damage.

Contractual liability

In some cases, fraudulent and/or injurious conduct can also give rise to a contractual claim under an existing contract. The victim can opt to lodge a claim against its contractual partner based on the general provisions on contractual liability (Articles 97 et seq SCO) and/or provisions specifically governing the contract in question.

Four conditions must be met under the general rule on contractual liability:

- a breach of contract;
- damage suffered by the claimant;
- a causal link between the breach and the damage caused; and
- a fault on the defendant's part (however, under contractual liability – unlike liability in tort – the fault of the defendant is presumed, ie, it is up to the defendant to demonstrate that they were not at fault).

Moreover, the provisions of the SCO that govern specific contracts contain additional rules dealing with wilful misrepresentation or fraudulent conduct by a party to such contract. This is, for example, the case with Articles 199 and 203 SCO (contract of sale), which limit a seller's defences if the seller wilfully misled the buyer or fraudulently concealed a default.

Generally, insofar as contract claims are concerned, Swiss law holds as null and void any contractual provisions limiting or excluding a party's liability for wilful misconduct or gross negligence, unless the exclusion of liability applies to the acts of so-called auxiliaries, eg, employees (Article 101 SCO). This provision aims at restricting exclusions of liability, namely, in cases of wilful fraudulent conduct.

Agency without Authority

The SCO also contains provisions on the concept of agency without authority (negotiorum gestio), which allows a principal to sue an agent who acted unlawfully and in bad faith, and thus infringed the rights of the principal (Article 423 SCO).

This provision applies, for example, where an asset entrusted to a party was used or sold without authority.

The principal can seek to recover the profits obtained by the agent as a result of its unlawful conduct, but may have to reimburse certain expenses incurred by the agent.

Furthermore, specific provisions of Swiss law apply where the infringement concerns intellectual property and personality rights, among others.

Causes of Action in an Insolvency/ Bankruptcy Context

Finally, Swiss law also provides for remedies for fraudulent or injurious conduct committed in a bankruptcy (or pre-bankruptcy) context. Thus, a victim can seek civil compensation if it suffers damage as a result of criminal offences preceding or committed in the context of bankruptcy, such as, fraudulent bankruptcy or mismanagement (Articles 163 et seq SCC).

In addition or alternatively to this, creditors may file, within three years of the declaration of bankruptcy, civil claw-back actions in cases where the debtor carried out acts in the five years preceding the declaration of bankruptcy, with a clear intent of disadvantaging its creditors or of favouring certain creditors to the disadvantage

of others (Articles 285 et seq of the Swiss Debt Enforcement and Bankruptcy Act – SDEBA).

1.2 Causes of Action after Receipt of a Bribe

Bribery in the private sector is punishable under Swiss law. Thus, a person who demands, secures a promise of or accepts an undue advantage in their capacity as agent of a company (eg, representative, employee or board member) commits an act of bribery under Article 322novies SCC, provided this results in conduct contrary to the agent's professional duties or in the exercise of its discretion.

Depending on the conduct of the agent, they can also be held liable for criminal mismanagement under Article 158 SCC, an act of fraud under Article 146 SCC and other offences as relevant. This will, in particular, be true if the agent has breached their duty of care towards their employer, eg, by failing to turn the commission received over to the company or by abusing their powers within the company to conclude deals on its behalf.

The bribe that the agent fails to turn over to their employer can amount to damage suffered by the company under Article 158 SCC (criminal mismanagement) but, as such, it is unlikely to be recoverable by the employer; instead, the bribe amounts to proceeds of corruption that will likely be confiscated by the state.

On the other hand, under certain circumstances, the company may be able to seek compensation from the agent for the damage caused by the agent's conduct, pursuant to the provisions (statutory and/or contractual) governing their relationship (see also **3.1 Imposing Liability for Fraud on to a Corporate Entity** and **3.3 Shareholders' Claims against Fraudulent Directors**).

1.3 Claims against Parties Who Assist or Facilitate Fraudulent Acts

Distinction between Perfect and Imperfect Solidarity

Under the rules on tortious liability, where two or more persons have together caused damage by a common fault and by conduct that is unlawful, they are jointly and severally liable to the victim, whether as co-perpetrators, aiders or abettors – "instigators" or "accomplices" in Swiss legal terms (Article 50 SCO, perfect solidarity).

The degree to which the co-perpetrators, instigators or accomplices assist or facilitate a fraudulent act has no impact on their civil liability vis-à-vis the victim, to the extent that the parties will be held jointly and severally liable. The victim may thus choose to claim compensation in full equally from the perpetrator(s), the instigator or the accomplice to the same act. The court will then determine at its discretion whether and to what extent the liable parties have a recourse claim against one another.

On the other hand, where two or more persons are liable for the same damage but on different grounds (ie, absence of one common fault), the victim will still be entitled to choose to claim the damage in full or in part against any of the liable parties. However, the rules of recourse between the various persons liable will differ slightly. As a rule, the court will decide on their degree of liability, starting first with those who are liable in tort, then by contract and lastly, by statutory liability (Article 51 SCO, imperfect solidarity).

Receipt of Fraudulently Obtained Assets

The situation is different if a person's assistance consists only in the receipt of fraudulently obtained assets: such party is in principle excluded from joint and several liability. Under the law, they are civilly liable for the damage caused only if and to the extent that they effectively obtained a share in the gains generated

by the unlawful conduct or otherwise caused damage due to their involvement or assistance (Article 50 SCO).

Third parties who knowingly receive assets that were fraudulently obtained may also be criminally liable for the offence of handling stolen goods (Article 160 SCC) or money laundering (Article 305bis SCC). In such cases, the criminal authorities can order various remedial measures against the third party in question (see **1.5 Proprietary Claims against Property**).

1.4 Limitation Periods

Civil claims arising out of unlawful and/or fraudulent conduct are subject to statutory limitation periods. As of January 2020, following a partial revision of the SCO, the following statutory limitation periods apply.

Contractual Claims

For contractual claims, the general limitation period is ten years, unless a shorter period of five years applies by virtue of the type of claim in question, eg, periodic payments such as rent or interest; particular services of agents, employees, doctors, lawyers, craftsmen; and others (Articles 125 et seq SCO).

Wilful Misrepresentation

The limitation period for a victim of wilful misrepresentation (or so-called "contractual fraud") to declare the contract null and void is one year from the date on which the victim discovered the wilful misrepresentation.

After this time period, the contract is deemed ratified by the victim, who may still seek compensation for damages in tort (Article 31 SCO). Even where a victim has failed to bring a tort claim within the above limitation periods, however, they may still be entitled to refuse to perform the obligation incumbent on them under a contract tainted by fraudulent conduct (Article 60 SCO).

Claims Based on Precontractual Liability (Culpa in Contrahendo)

Claims based on culpa in contrahendo are structurally almost identical to contractual damages claims. However, the Swiss Federal Supreme Court consistently applies the limitation period applicable to tort claims under Article 60 SCO (see directly below).

Tort Claims

Under Article 60 SCO, tort claims must generally be raised within a period of three years as of the date on which the victim became aware of the damage suffered and the identity of the liable person, but in any event, within ten years following the date on which the unlawful conduct took place or ceased to occur (or 20 years in cases of death or bodily injury).

For tort claims arising from a criminal offence for which the SCC provides a longer limitation period, this longer period applies. For example, the criminal offences of fraud and forgery are felonies and both are subject to a limitation period of 15 years.

Here too, where a victim has failed to bring a tort claim within the above limitation periods, they may nonetheless be entitled to refuse to perform the obligation incumbent on them under a contract tainted by fraudulent conduct (Article 60 SCO).

Claims based on agency without authority are also subject to a statute of limitations under Article 60 SCO.

Unjust Enrichment

Claims of unjust enrichment (ie, recovery of sums paid without cause) are also subject to a limitation period of three years after the date on

which the victim became aware of their claim, but must in any event be raised within ten years from the moment the claim first arose (Article 67 SCO).

Proprietary Claims

See **1.5 Proprietary Claims against Property**.

Criminal Redress

The limitations applicable to tort claims also apply to civil compensation claims lodged in the framework of criminal proceedings. In addition, the victim must heed certain deadlines and procedural rules as applicable.

1.5 Proprietary Claims against Property

In cases where a claimant seeks to recover material assets misappropriated or transferred as a result of fraud, the claimant has a choice of two avenues: civil action(s) or criminal redress.

Civil Recovery

Where property over an asset was transferred without due cause (eg, based on a contract invalidated due to wilful misrepresentation), the claimant can at any time file an action to reclaim title against any person who holds the asset in question (Article 641 of the Swiss Civil Code – SCivC).

In addition, where the claimant was dispossessed of a movable asset against their will, the claimant can also file an action to reclaim possession against any person who holds the asset, within a period of five years (Articles 934 et seq SCivC). The five-year limitation does not apply where the current holder did not acquire the asset in good faith (ie, bad faith holder of assets).

The victim may also seek to recover the profits and/or interest generated with the use of the misappropriated or fraudulently obtained assets (Articles 938 et seq SCivC). The defendant will, however, be entitled to seek compensation for certain expenses in relation to the assets.

A defendant can resist the actions above by claiming to have acquired title in good faith or through the passage of time (uninterrupted and good faith possession for five years).

Movable assets can also include cash or bearer shares to the extent they are not mixed with assets belonging to a third party. As for the recovery of mixed assets or of funds, actions for the recovery of title or possession are not available: instead, the claimant may initiate an action for unjust enrichment (Article 62 SCO) or another action as relevant (see **1.1 General Characteristics of Fraud Claims**).

Where the asset transferred as a result of fraud is immovable property, the victim can act against the person who was unduly listed as the new owner of the property to reclaim it (Article 975 SCivC).

Criminal Redress

Under Articles 70 et seq SCC, where property was criminally misappropriated or a transfer was induced by criminal fraud, the criminal authorities can:

- directly restore the fraudulently obtained assets to the victim; or
- confiscate (ie, forfeit) the assets, if available or, failing such, order a compensatory claim for an equivalent amount and allocate the assets (or proceeds of the sale thereof) to the victim.

If assets were transferred to a third party in between, the third party in question could object to confiscation, namely, if they had acquired the assets in good faith (ie, if unaware of the grounds for confiscation) and if due consideration was provided in return.

The remedial measures will also cover the profits and/or interest generated with the use of the criminal proceeds. In cases where the proceeds of fraud were mixed with other funds, their confiscation/compensation remains possible, provided their movement can be retraced and connected to the offences in question.

1.6 Rules of Pre-action Conduct

Advance on Costs and Security for Costs

Claims brought before a civil court will be subject to an advance on (court) costs due before the claim is administered and served upon the opposing party. In addition, upon the request of a defendant, the claimant will be ordered to provide security for (legal) costs, in the form of a cash payment to the court or a bond, where the claimant:

- resides or is seated abroad;
- appears insolvent;
- owes costs to the defendant from prior proceedings; or
- for other reasons, is unlikely to provide compensation for legal costs.

The amounts will vary depending on the canton in which the civil claim is filed in court.

Prior Conciliation Proceedings

Moreover, most claims brought before a civil court, whether contractual or in tort, are subject to prior mandatory conciliation, the aim of which is to secure, where possible, a mutually acceptable solution for the parties before the matter goes to court. Conciliation can be waived unilaterally in certain circumstances and types of cases.

1.7 Prevention of Defendants Dissipating or Secreting Assets

Interim relief can be sought before a claim on the merits is filed with a civil court or else throughout the civil trial. This aims at preventing a defendant, by way of a preliminary injunction, from disposing of certain assets located in Switzerland pending the resolution of the underlying substantive proceedings.

Swiss law makes a distinction between monetary and non-monetary claims.

Civil Attachment for Monetary Claims

A creditor can secure a monetary claim by filing an application for the attachment (freezing) of assets under the Swiss Debt Enforcement and Bankruptcy Act (Articles 271 et seq SDEBA). The attached assets include bank accounts, movable and immovable property, claims and securities, among others.

The applicant must demonstrate the likelihood of the following three points:

- the existence of the claim that needs securing;
- a statutory ground for attachment; and
- the existence of assets and their location.

A statutory ground for attachment is given in six alternative scenarios, such as where (among others):

- the debtor has no permanent residence in Switzerland;
- the debtor is attempting to conceal assets or is planning to flee Switzerland to avoid fulfilling its obligations; or
- the creditor holds a definitive enforceable title against the debtor (such as a judgment or arbitral award).

The attachment must, in principle, only target assets belonging directly to the debtor, unless a valid case of piercing the veil can be argued (see also **3.2 Claims against Ultimate Beneficial Owners**). Third parties affected by an attach-

ment can lodge a claim for restitution by asserting a preferable right over the asset in question.

The attachment is ordered ex parte, usually within 24 to 48 hours. The proceedings become adversarial only if the opposing party objects to the attachment within ten days from service of the attachment order.

Failure to comply with the attachment order is a criminal offence and will expose the non-complying party to criminal penalties (Article 169 SCC).

Interim Measures Securing Non-monetary Claims

Measures can also be sought to secure non-monetary claims under Articles 261 et seq of the Swiss Civil Procedure Code (SCPC). These namely include injunctions (eg, a ban on moving or transferring property), orders to cease and desist or to remedy an unlawful situation, performance in kind, and others.

The applicant must demonstrate the likelihood of the following three points:

- the likely existence of a valid cause of action on the merits;
- an impending harm (or urgent risk thereof) to the rights on which the applicant relies; and
- a risk of damage that will be difficult to repair.

The measures can be granted inter partes (which can take several months, depending on the complexity of the matter and the domicile of the parties) or ex parte (such measures are usually ordered within 24 to 48 hours). In addition to the conditions outlined above, a party requesting ex parte measures must prove an imminent risk of danger and/or a certain degree of urgency, or else a risk associated with tipping off the opposing party.

Interim measures can be imposed under the threat of criminal sanctions (Article 292 SCC), in which case, the non-complying party is liable to a fine of up to CHF10,000.

Characteristics Common to Both Types of Measures

Moreover, in relation to both types of interim measures discussed above:

- if the interim measures precede a civil trial, the applicant will have a fixed number of days from the service of the interim order or the attachment to "validate" these measures by commencing a civil action against the opposing party;
- the applicant must pay an advance on costs (eg, up to CHF2,000 for an attachment application, plus extra costs due for the execution of the attachment order); and
- the applicant is liable for damages caused by an unjustified interim measure or attachment and the court may, on this basis, order the applicant to provide security (eg, security in an attachment application can amount to up to 10% of the claim value).

No Worldwide Freezing Order Available under Swiss Law

In any event, there is no equivalent under Swiss law to a worldwide freezing order (WFO) or Mareva injunction that would cover assets belonging to a defendant globally. In fact, freezing orders do not target a defendant and its estate as such, but rather a specific asset.

That being said, a WFO secured abroad can be enforced in Switzerland under certain conditions and serve as a ground for the attachment of certain (specifically designated) assets located on Swiss soil.

Criminal Freezing Orders

In addition to the above civil avenues, the criminal authorities have extensive coercive measures at their disposal and can order the freezing over assets located in Switzerland or request the freezing of assets located abroad via judicial legal assistance. Assets may be frozen, namely, if it is likely that they have to be returned to the victim, confiscated or used for a compensatory claim (Articles 263 et seq of the Swiss Criminal Procedure Code – SCrimCP). Under certain conditions, the freezing order can target third-party assets (see **1.3 Claims against Parties Who Assist or Facilitate Fraudulent Acts** and **1.5 Proprietary Claims against Property**).

2. PROCEDURES AND TRIALS

2.1 Disclosure of Defendants' Assets

As mentioned above (see **1.7 Prevention of Defendants Dissipating or Secreting Assets**), a defendant may be the subject of an interim measure (such as a civil attachment or injunction) prohibiting it from dissipating assets located in Switzerland.

Civil Claims

In applying for such measures in Switzerland, the applicant must, as a rule, indicate specifically what assets they wish to target and the location of these assets. While a number of publicly available sources in Switzerland can prove helpful (such as the commercial register, the land register, the aircraft register, etc), it will be up to the applicant to piece the evidence together (with recourse, for example, to forensic accountants or other asset-tracing professionals where needed). Indeed, there is no pre-trial discovery in Switzerland, and the production of documents during trial is usually limited to evidence that can be precisely designated by the party requesting it.

The rules are different if the civil claim results in an enforceable judgment or arbitral sentence and if the judgment creditor commences enforcement proceedings on this basis. In such a case, a debtor may be the subject of a search and seizure of assets, if necessary with the help of the police. The debtor, as well as affected third parties (eg, banks) will also have the duty to provide relevant information to the enforcement authorities (see **5.1 Methods of Enforcement**).

Criminal Claims

In contrast to civil avenues, the Swiss criminal authorities have extensive investigatory powers and can obtain information on assets in Switzerland belonging to a defendant (or of which the defendant is a beneficial owner), at any stage of the investigation or ensuing criminal trial. The criminal authorities may conduct a search and seizure of documents or data at the defendant's residence or place of business. The criminal authorities may also freeze assets (see **1.7 Prevention of Defendants Dissipating or Secreting Assets**).

For this reason, where the victim of a criminal offence is not in possession of sufficient information to commence a civil claim or file for an attachment order, it may be advisable to seek evidence and secure assets with the help of a criminal investigation (see also **2.5 Criminal Redress**).

2.2 Preserving Evidence

The Swiss rules of civil procedure do not provide for pre-trial discovery, which means that, to obtain evidence in Switzerland, a party must, as a rule, commence litigation.

Article 158 SCPC provides an exception to this rule and allows evidence to be taken on a precautionary basis, ie, before the initiation of a civil trial in Switzerland or abroad. This tool allows a claimant to assess the chances of success

of a contemplated substantive claim and/or to quickly secure evidence that is at risk in view of a potential civil action.

The applicant must show on a prima facie basis that:

- evidence is at risk; and
- the applicant has a legitimate interest in obtaining the evidence pre-trial.

Examples include collecting witness or material evidence that must be secured quickly (eg, evidence that is likely to be destroyed, to disappear or to perish soon); or a current situation that needs to be assessed by an expert and recorded judicially before it deteriorates irreversibly.

The evidence is gathered in summary (ie, accelerated) proceedings, conducted inter partes. The scope of evidence-gathering measures available to the civil court are limited to those generally available to the court at trial, which are:

- witness testimony;
- the questioning of parties;
- the gathering of documentary evidence;
- judicial inspections (eg, on-site visits);
- expert opinions; and
- requests for written evidence/information from third parties.

2.3 Obtaining Disclosure of Documents and Evidence from Third Parties

The Evidentiary Process in Civil Trials

As mentioned in **2.2 Preserving Evidence**, there is no pre-trial discovery under Swiss law (with the limited exception of Article 158 SCPC).

During trial, evidence is either produced voluntarily by a party (in support of a submission) or its production is ordered by the court. A party can request an order from the court directing the opposing party or a third party to disclose certain specifically identified documents or electronic data in their possession. The court will grant such a request if it holds that the evidence is needed to establish legally relevant facts of the dispute. Open-ended requests for document production (so-called "fishing expeditions") are, however, prohibited.

The Duty to Co-operate and the Right of Refusal

As a rule, parties to a civil trial as well as third parties (including witnesses), are required to assist the court in establishing the facts of the dispute and to co-operate in the taking of evidence. In particular, they must make truthful witness statements, produce documents or physical records and permit an inspection of their person or property by an expert (Article 160 SCPC).

- Under certain conditions, third parties may refuse to co-operate (Articles 165 et seq SCPC). The right to refuse co-operation is absolute if third parties have a family connection or a close personal relationship to one of the parties, or if the party is requested to produce documents covered by attorney-client privilege (see **6. Privileges**).
- Other grounds provide a relative (or limited) right of refusal, which must be justified in the eyes of the court. This includes, for example, cases where witnesses would, in establishing facts, expose themselves or someone close to them to criminal prosecution or civil liability, or where a witness is bound by professional secrecy.
- Regarding this latter point, with the exception of the clergy and lawyers, who maintain absolute control over the secrets entrusted to them and can refuse to co-operate on this basis, other custodians of secrets protected by Swiss law (such as public officials, doctors and bankers, among others) cannot legitimately resist co-operation if they are under a duty to disclose and/or if they have been duly

released from their duty to maintain secrecy, unless they show credibly that the interest in protecting the secret outweighs the interest in establishing the truth. This rule thus applies to bankers bound by banking secrecy (see **7.2 Laws to Protect "Banking Secrecy"**).

Consequences of a Refusal to Co-operate and Means to Compel Co-operation

A justified refusal to produce documents by a trial party or third party does not affect the court's assessment of the facts of the case.

In contrast, a refusal to co-operate that the court deems unjustified will have procedural consequences depending on the status of the party in question.

- A failure to comply by a trial party is not sanctioned as such, but the court will be entitled to take it into account when assessing the facts (eg, adverse inference).
- A refusal to co-operate by a third party/witness is punishable by a disciplinary fine, an order to comply under the threat of criminal penalties, compulsory measures or an order obliging the third party to bear costs arising from the collection of the evidence requested from it. These measures aim at compelling the third party to co-operate.

A failure to produce evidence or appear at a hearing despite a summons is equated to an unjustified refusal to co-operate (on the rules on default, see **2.6 Judgment without Trial**).

Restrictions on Resulting Evidence

Evidence obtained at trial is generally available to the trial parties and its use outside of the civil proceedings is normally unrestricted. However, in certain cases, a court can order appropriate measures to ensure that the taking of evidence does not infringe the legitimate interests of the parties (Article 156 SCPC). The court can, for example, issue a confidentiality order (not unlike a gag order) prohibiting the parties from divulging certain protected information obtained at trial, such as business secrets (eg, know-how or client-identifying data) or strictly personal information, among others.

2.4 Procedural Orders

See **1.7 Prevention of Defendants Dissipating or Secreting Assets**.

2.5 Criminal Redress

The Benefit of Criminal Proceedings

In the absence of pre-trial discovery in Switzerland, civil trials in fraud-related matters are often complemented by criminal proceedings so as to secure evidence and locate/freeze assets in a timely fashion.

Criminal authorities are under a duty to investigate (ex officio or upon a criminal complaint) and to prosecute offences falling under their jurisdiction. Their powers include identifying, tracing and seizing/freezing the proceeds of offences (see **1.7 Prevention of Defendants Dissipating or Secreting Assets**) as well as securing evidence through searches, seizure of documents/data or orders for the production of evidence (see **2.1 Disclosure of Defendants' Assets**). The resulting evidence is, as a rule, added to the file of the criminal investigation, which the victim can then inspect and rely upon to substantiate a tort claim for the damage suffered as a result of the criminal offence.

In addition to the above, the criminal authorities can also take remedial measures to compensate victims of criminal offences, for example, by returning assets to the victim directly (see **1.5 Proprietary Claims against Property**).

The institution of criminal proceedings thus enables a victim of fraud to benefit from the extensive coercive powers available to the criminal

authorities, normally without having to bear the costs arising from evidence-gathering measures (as opposed to civil trials), unless the victim is deemed to have triggered the criminal proceedings abusively or has otherwise acted in a grossly negligent way.

Interaction between Civil and Criminal Proceedings

A civil trial can be conducted in parallel with, in advance of or following the closing of criminal proceedings. Swiss law provides for several procedural means by which civil and criminal proceedings can be co-ordinated. Co-ordination can be ensured, for example, through a stay of the civil trial pending the outcome of the criminal investigation (Article 126 SCPC).

Civil claims can also be filed in the framework of the criminal investigation itself, since criminal authorities can adjudicate certain civil claims without referring them to a civil court. A harmed party can thus assert its civil claims in the capacity of a so-called "private plaintiff" in the framework of criminal proceedings (Articles 115 et seq SCrimCP).

Where the criminal authorities consider that the civil courts are better suited to adjudicate the civil claims in question, the victim will be invited to file its claim before the civil courts instead. Civil claims will also need to be asserted before the civil courts if:

- the criminal investigation is discontinued or closed by way of a summary penalty order;
- the accused is acquitted and the factual situation is not sufficiently ascertained for civil claims to be ruled upon; or
- the private plaintiff has failed to sufficiently substantiate or quantify its claim or to pay security in respect of such claim.

2.6 Judgment without Trial

In a civil trial, a judgment without a full trial may occur where the defendant fails to make an appearance or participate in the proceedings as required by the law. In particular:

- where the defendant fails to file its statement of defence by the allocated deadline (and in an additional grace period thereafter), the court can issue its final decision, provided the case is ripe for decision and the court is in a position to rule without any further gathering of evidence (Article 223 SCPC); or
- where a defendant fails to duly attend the trial, the court can rule on the basis of the pre-trial submissions made by the parties and rely on the allegations of the claimant as well as the information on file (Article 234 SCPC).

2.7 Rules for Pleading Fraud

In a civil trial, the claimant carries the burden of proof in alleging the facts in support of its claim (Article 8 SCivC). Unlike certain jurisdictions, in Switzerland there is no special evidentiary standard for fraud claims as opposed to other torts.

However, the required standard of proof is very high in Swiss courts. All facts alleged in support of the claim must be proven to the full conviction of the court. A preponderance of evidence or balance of probability is insufficient. This includes in particular the substantiation and proving of alleged damages. While Article 42 (2) SCO enables the courts to estimate losses, where such cannot be quantified in numbers, the courts rarely make use of it.

Moreover, besides the professional rules of conduct applicable to lawyers in general, Swiss law does not impose any special duties on lawyers when pleading fraud in a civil trial.

2.8 Claims against "Unknown" Fraudsters

In cases where the victim of fraudulent and criminal conduct is not in possession of sufficient information to file a tort claim in civil court against a specific person, it may be advisable to seek evidence and secure assets with the help of a criminal investigation.

In such a case, the victim can file a criminal complaint against "unknown persons", and declare itself private plaintiff in the criminal proceedings, relying on the powers of the criminal authorities to identify the perpetrators of the criminal offence in question.

The same avenue will not be available for claims for damages or unjust enrichment arising out of contractual liability.

2.9 Compelling Witnesses to Give Evidence

See **2.3 Obtaining Disclosure of Documents and Evidence from Third Parties**.

3. CORPORATE ENTITIES, ULTIMATE BENEFICIAL OWNERS AND SHAREHOLDERS

3.1 Imposing Liability for Fraud on to a Corporate Entity

Several key provisions of Swiss law govern the basis on which a legal entity can be held liable for the unlawful conduct of its employees, agents or directors.

Civil Corporate Liability for Unlawful Acts of Management

In the Swiss conception of corporate civil liability, the conduct of corporate bodies/directors is directly attributable to the company. Indeed, the governing officers express the will of the company and bind the company by actions carried out within the scope of their functions, namely, by concluding transactions on the company's behalf (Article 55 SCivC).

Swiss law also provides an alternative legal basis for liability of a company limited by shares ("SA", "AG" or "Ltd"), under which, such company is liable for any damage caused by unlawful acts carried out in the exercise of its functions by a person with authority to represent the company or to manage its business (Article 722 SCO).

A company is thus liable vis-à-vis a victim of unlawful fraudulent behaviour where two conditions are met.

- If the unlawful act was committed by a corporate body/director in the exercise of its functions, such as the representation or management of the company. This includes the acts of formal or de jure directors within a company but also de facto directors (eg, a sole beneficial owner who exercises decisive powers in the management of the company) and apparent directors (eg, a person who is neither a formal nor a de facto director but appears as such to a reasonable third party).
- Provided the general conditions for liability in tort are met under Article 41 SCO (conditions detailed in **1.1 General Characteristics of Fraud Claims**).

Civil Corporate Liability for Unlawful Acts of Employees or Auxiliaries

If the perpetrator is not a corporate body/director within a company, but rather an employee or auxiliary (ie, an agent who, without being a director, is involved in the representation or management of the company), the company may be liable in its capacity as an employer (Article 55 SCO).

Unlike the liability for the acts of management, the company does not respond automatically to its employees' or auxiliaries' conduct. Indeed, the company can be released from liability if it can rely on an exonerating defence, particularly where:

- the employer is able to prove that it had exercised the necessary diligence, in particular in the selection, instruction and supervision of the employee; and
- the employer is able to show that there was no causal link between the damage caused by the employee or auxiliary and the lack of diligence on the employer's part.

Personal Liability of Management and Auxiliaries or Employees

In addition to the company, directors are personally liable for their unlawful acts vis-à-vis the victim (Articles 55 SCivC and 754 SCO) – see **3.3 Shareholders' Claims against Fraudulent Directors**. Auxiliaries or employees of a company are also personally liable (Article 55 SCO).

The individual in question may thus be held jointly and severally liable with the company vis-à-vis the victim (Article 50 SCO, see **1.3 Claims against Parties Who Assist or Facilitate Fraudulent Acts**). The company may then be entitled to seek recourse against the individual pursuant to the provisions (statutory and/or contractual) governing their relationship.

Criminal Corporate Liability

In addition to civil liability, the company can be held criminally liable for the fraudulent conduct of its corporate bodies/directors, agents and employees under certain conditions.

Swiss law distinguishes between two types of corporate criminal liability: secondary and primary liability (Article 102 SCC).

- Secondary corporate criminal liability is relevant only if the underlying offence cannot be attributed to a specific individual due to the company's deficient organisation.
- In contrast, primary liability is a direct, autonomous and joint liability, and may be triggered alongside the criminal liability of an individual. This type of liability is given where a company has failed to take all reasonable organisational measures to prevent the commission of any of the offences exhaustively listed in Article 102 (2) SCC (eg, money laundering, bribery of public officials and bribery of private individuals, among others).

Where criminal liability is ascertained, the company can be the subject of remedial measures ordered against it to the victim's benefit (see **2.5 Criminal Redress**).

3.2 Claims against Ultimate Beneficial Owners

The company and its shareholder are two legally distinct subjects of law. However, Swiss law recognises that certain exceptional circumstances may warrant a piercing of the corporate veil, based on the principle of transparency (*Durchgriff*).

Swiss case law distinguishes between direct transparency and reverse transparency. The first allows a creditor to enforce the debt of the company against the shareholder, while the second allows a creditor to do the opposite, ie, enforce the debts of the shareholder against the company. Generally speaking, transparency relates as much to claims arising from unlawful acts as from a contract.

The case law of the Swiss Federal Supreme Court admits such piercing restrictively and on an exceptional basis, essentially where:

- a debtor and the legal entity share the same identity from an economic point of view (identity of persons), or where there is economic domination of the first over the second; and
- the reliance on the legal independence between the two legal subjects appears manifestly abusive.

Where the above conditions are met, the claimant could rely upon it to bring an action before the civil courts and/or apply for interim measures (such as an attachment of assets).

In addition to the above, where a beneficial owner (eg, sole shareholder or ultimate beneficial owner – UBO) is not formally appointed as a corporate body within the company, but makes decisions that are normally reserved for de jure directors, the beneficial owner may qualify as a de facto director. As such, they could be held personally liable for the company's unlawful conduct (see **3.1 Imposing Liability for Fraud on to a Corporate Entity**), namely, where the company has been used as a vehicle for fraud. In such a scenario, the victim could direct its civil action as much against the de facto director as against the company.

3.3 Shareholders' Claims against Fraudulent Directors

Personal Liability of Fraudulent Directors

In a company limited by shares, directors as well as all other persons involved in the management of a company (eg, de facto directors) are personally liable to the company, to each shareholder and to the company's creditors for the damage caused by an intentional or negligent breach of their duties (Articles 754 et seq SCO).

If several directors are liable for damage, any one of them is jointly and severally liable along with the others, to the extent that the damage is attributable to the director in question based on their own fault and the circumstances of the case at hand.

The civil liability of directors is subject to four cumulative requirements, for which the claimant bears the burden of proof:

- a breach of duty (ie, unlawful nature of the conduct);
- damage;
- a causal link between the breach of duty and the damage; and
- the fault of the director (ie intentional or negligent breach of their duties).

Standing to Sue

Individual claims of shareholders or creditors against a director

Where a creditor or a shareholder are the only ones to suffer direct damage caused by the unlawful conduct of a director (ie, the company itself is not harmed), the creditor or shareholder have standing to sue by way of an autonomous claim.

On the other hand, a creditor or shareholder has no right to bring an autonomous claim if their damage is merely indirect, ie, if they suffered damage only as an indirect consequence of the director's unlawful conduct.

Where both the creditor or shareholder and the company suffer direct damage arising from the director's unlawful conduct, Swiss case laws permits a creditor or shareholder to bring an autonomous claim but only in rare and exceptional cases.

Claims of the company for damage suffered

Where a company is not insolvent (ie, outside of bankruptcy proceedings), both the company and each individual shareholder are entitled to sue the director for any losses caused to the

company. The shareholder's claim must request for compensation to be paid to the company.

In contrast, where the company is bankrupt, its creditors are entitled to request that the company be compensated for the losses suffered. It is primarily up to the insolvency administrators to assert the claims of the shareholders and the company's creditors.

Where the insolvency administrators, acting on behalf of the company's estate, waive their right to assert such claims, any shareholder or creditor is entitled to bring them in their stead. The SCO provides for an order in which the proceeds of a successful claim will then be used. The estate may, however, also assign such claims to creditors who may then pursue them on their own behalf to cover their remaining losses.

4. OVERSEAS PARTIES IN FRAUD CLAIMS

4.1 Joining Overseas Parties to Fraud Claims

The Swiss civil courts have jurisdiction if and to the extent it is provided for in the Swiss Private International Law Act.

Where jurisdiction is given with respect to one defendant, a Swiss court will also have jurisdiction with regard to all the other defendants against whom a claim is brought, unless jurisdiction is based solely on a choice-of-forum agreement, in which case, this agreement should not be opposable to non-contracting parties (Article 15 SCPC). This rule generally allows the victim to bring a claim against all liable parties before a single Swiss court.

Jurisdiction of the Swiss courts will also be given in so-called "third party actions", ie, where a defendant brings a third party into the proceedings in order to assert a recourse claim against said third party, which would arise in case of an unfavourable judgment on the main claim. In other words, a third party can be added into the proceedings if the defendant believes that third party is (also) liable. In such cases, the Swiss court that has jurisdiction to rule on the main claim also has jurisdiction with respect to the third-party action (Article 16 SCPC).

Finally, third parties to the trial who reside overseas and whose assistance is required for the gathering of evidence (eg, witnesses or other third parties in possession of relevant data or documents) can be questioned or requested to produce evidence via international judicial legal assistance channels, in particular, based on the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, to which Switzerland is a signatory state.

5. ENFORCEMENT

5.1 Methods of Enforcement

A creditor who obtains a favourable court judgment or arbitral award can execute it in Switzerland. Swiss law makes a distinction between the enforcement of monetary claims (eg, claims for damages or monetary compensation) and non-monetary claims (eg, claims to return property or claims for specific performance).

Enforcement of Monetary Claims

A judgment creditor is entitled to execute its monetary claim against the debtor's assets in Switzerland under the SDEBA. To secure its position, attachment orders are an essential tool and often the first step in the enforcement process (see **1.7 Prevention of Defendants Dissipating or Secreting Assets**).

The enforcement process begins with a debt enforcement request filed by the creditor, normally at the place of the debtor's seat or residence, and the service of a payment order to the debtor by the debt-enforcement authorities. The debtor may object to the claim, in which case, the creditor would have to initiate judicial proceedings to set aside the objection.

The ensuing enforcement proceedings for the majority of monetary claims (with a few exceptions to the rule, namely, for secured claims) will be carried out by way of asset seizure and forced sale for natural persons, or by way of bankruptcy for legal entities.

Enforcement of Non-monetary Claims

Enforcement of non-monetary claims is based on the rules of civil procedure. Under the SCPC, judgments can be enforced if they have come into force or, failing such, if the court has ordered their anticipated enforcement.

If the judgment does not directly order enforcement measures in its operative part, a judgment creditor can apply for enforcement measures (Article 343 SCPC), such as:

- enforcement under the threat of criminal penalties, a disciplinary fine of up to CHF5,000 or up to CHF1,000 per day of non-compliance;
- a compulsory measure such as the confiscation of movable property or vacating of immovable property; and/or
- order for performance by a third party.

The enforcement authorities can call on the police to secure enforcement. Moreover, the parties against whom enforcement is sought, as well as the affected third parties, must provide the required information to the authorities and tolerate any necessary searches.

6. PRIVILEGES

6.1 Invoking the Privilege against Self-incrimination

Parties to a civil trial are generally required to produce evidence and collaborate in the gathering of evidence where directed to do so by the civil court, except where (among others) the documents and information concerned relate to contacts between a lawyer (or patent lawyer) and their client, ie, attorney-client privilege (Article 160 SCPC).

Privilege covers only the typical activities of a lawyer, which means that non-typical activities (such as investment advice, financial intermediation or management of companies) are not protected. Likewise, exchanges with in-house counsel are not covered to date.

Similarly, in criminal proceedings, privileged documents cannot be seized or used as evidence by the criminal authorities against an accused or a defendant, except in the exceptional circumstances described in **6.2 Undermining the Privilege over Communications Exempt from Discovery or Disclosure**.

6.2 Undermining the Privilege over Communications Exempt from Discovery or Disclosure

The client is free to waive attorney-client privilege. However, even if a waiver has been given by a client, a lawyer remains entitled to refuse disclosure. The rule, therefore, is that a lawyer cannot be compelled against their will to break attorney-client privilege.

There are exceptional circumstances, however, in which a lawyer may be legally compelled to reveal privileged information. This includes cases where attorney-client privilege is raised by the lawyer in an abusive fashion and for criminal purposes (eg, to conceal evidence from the

authorities). In criminal proceedings, privileged documents can also be seized and used as evidence if the lawyer is themselves a suspect in a criminal investigation and the privileged information relates to the investigated facts.

7. SPECIAL RULES AND LAWS

7.1 Rules for Claiming Punitive or Exemplary Damages

As a rule, the amount of damages awarded to a claimant in Switzerland must compensate the actual loss suffered by the claimant, plus interest of 5% per annum. In certain circumstances, moral compensation can also be awarded, but is typically low in value.

Punitive or exemplary damages are not available in Switzerland. Swiss courts will refuse to award punitive damages even if a Swiss court must apply, by virtue of the Swiss conflict of laws provisions, a foreign law that provides for such damages (Article 135 of the Swiss Private International Law Act).

7.2 Laws to Protect "Banking Secrecy"

Banking secrecy in Switzerland stems from the contractual relationship between the client and the bank, as well as the client's civil right to personal privacy. Banking institutions, as well as their directors and employees, are generally prohibited from disclosing client data to third parties. Unauthorised disclosure is punishable under Article 47 of the Swiss Federal Act on Banks and Savings Banks, which is a criminal offence.

As mentioned in **2.3 Obtaining Disclosure of Documents and Evidence from Third Parties**, trial parties or third parties to a civil trial who are bound by banking secrecy are generally required to co-operate in the gathering of evidence, but may refuse to co-operate if they can show that the interest in protecting the secret outweighs the interest in establishing the truth. The situation is similar in criminal proceedings.

Bär & Karrer Ltd is a leading Swiss law firm with more than 170 lawyers in Zurich, Geneva, Lugano and Zug. The firm's core business is advising clients on innovative and complex transactions and representing them in litigation, arbitration and regulatory proceedings. Clients range from multinational corporations to private individuals in Switzerland and around the world. Most of the firm's work has an international component, and its extensive network consists of correspondent law firms that are all market leaders in their jurisdictions. The team has broad experience in handling cross-border proceedings and transactions.

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