

WILMS & PEYROT LAW FIRM

DAJV JAHRESKONFERENZ 2006

ASSET TRACING AND RECOVERY IN CROSS-BORDER DISPUTES:

THE CASE OF SWITZERLAND

Dr. Paul Peyrot, LL.M., Rechtsanwalt

Introduction

Recovery of assets is a process with three stages:

1. investigative measures to trace the assets
2. preventive measures to immobilize the assets (freezing, seizing)
3. executory measures to make the assets available.

This brief outlook shows the possibilities for foreign claimants to proceed in Switzerland in order to trace and recover the assets of their debtors.

In most cases, the assets will be on bank accounts, so that consideration has to be given to the fact that all information regarding the bank-client relationship is protected by banking secrecy. This could make tracing the assets a difficult task and the main task of

advisors to the claimant is finding the ways that allow to overcome the banking secrecy restrictions.

Banking Secrecy and How to Overcome It

Banks and Securities Dealers have a professional obligation to keep the details of a client's financial and personal affairs - including the very existence of the relationship with the client - strictly confidential. But banking secrecy is not absolute: first it can be lifted, whenever the customer so chooses with a valid waiver. Second it will be lifted by state action, mainly in the following cases:

- criminal proceedings within Switzerland

Bankers and securities dealers are required to testify, which includes delivering documents

- civil proceedings

Under most - but not all - Swiss cantonal codes of civil procedure, banking secrecy may be lifted. This is also the case in procedures of debt collection or bankruptcy. Further, in inheritance cases each successor, heir, representative, official administrator, executor or public liquidator has the right to obtain all pertinent information from a bank. Also, the Swiss Civil Code provides that the court can oblige third parties like banks to disclose all information and documents to the spouse of a client.

- international mutual judicial assistance in civil and commercial matters

In cross-border disputes, it is worth noting that Switzerland is a member of the

Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters.

- international mutual judicial assistance in criminal matters

The international and bilateral treaties on assistance in criminal matters to foreign States and the Swiss Federal Law on International Judicial Assistance in Criminal Matters allow for information to be transmitted to foreign criminal authorities and for assets to be frozen and handed over to foreign authorities.

- international mutual assistance in administrative matters

Bank and financial market supervisory authorities may obtain information from the Swiss Federal Banking Commission. The information may be used only for direct supervision of a supervised institution and may not be retransmitted to another authority or to a third party.

- money laundering

Banks and securities dealers are permitted to inform Swiss authorities if they have a reasonable suspicion that financial assets of their client are the proceeds of crime. If the suspicion is well-founded, they are required to notify the Money Laundering Reporting Office.

- US Qualified Intermediary (QI) system

Many Swiss bank and securities dealers have concluded QI agreements with the US Internal Revenue System and are thus required to disclose the identity of US citizens and tax residents.

1. Tracing Assets

- Introductory side note: there are no anonymous bank accounts. A “numbered” account means that the beneficial owner is known only by narrower circle of bank employees. Money laundering rules provide that the identity of the beneficial owner is disclosed in all payments made to foreign accounts.
- Swiss civil law provides for specific cases, where debtors and/or their banks are obliged to disclose their assets, e.g. spouses amongst each others and in inheritance cases.
- In the case of debt collection following the procedures of the Law of Debt Collection and Bankruptcy (especially when an attachment or bankruptcy are ordered), banks have to disclose all information regarding the debtor to the debt collection body. Also fiduciary transactions have to be disclosed and bank safe deposits have to be opened. In case of bankruptcy of the debtor, third parties and banks in particular have the duty to report the information and submit the records related to all assets of the bankrupt estate to the debt collection body. Banking secrecy is not applicable in dealing with the debt collection body.
- Pre-trial discovery in the American sense is unknown in Switzerland, and Switzerland grants only very limited assistance to preaction discovery proceedings of common law jurisdictions, even if the means of the Hague Convention of 1970 on the Taking of Evidence Abroad in Civil and Commercial Matters are used. Switzerland has made reservations to art. 23 of the HCon 79 regarding pre-trial discovery and to prevent fishing expeditions.
- However, a demand for legal assistance pursuant HConv 70 is the only way available to collect evidence in Switzerland for use in a foreign civil procedure

- Before pendency of a claim, a court may order the taking of evidence if this would be impossible or more difficult at a later stage (Beweissicherung).
- In the context of fraud, money-laundering and other criminal matters, starting a criminal prosecution in Switzerland is very efficient, but could be time-consuming and the debtor has no control over the proceedings.
- Alternatively, criminal prosecution abroad can be started and information can be obtained from the Swiss banks by the way of international assistance in criminal matters.

2. Immobilizing Assets

- There is no conclusive authority as to what injunctions and similar orders of foreign courts may be recognized and enforced - the regime is different from canton to canton and courts have been reluctant for various reasons (jurisdiction, due course of process, undue infringement of fundamental rights) to enforce anglo-saxonian injunctions and similar orders. Without enforcement by a Swiss Court, orders of foreign countries are worthless, as a domestic Bank may not directly obey an order of a foreign authority.
- The same is true for measures of interim nature ordered by foreign courts: the courts have refused to enforce foreign awards for interim measures, esp. for procedural reasons (defendant was not duly summoned or did not have the opportunity to make himself heard). This means that ex parte orders of foreign courts are not enforceable, making them useless for the purpose of asset recovery. To

get around this issue, the claimant can apply directly for provisional measures at a Swiss court, even if another court has jurisdiction as to the substance of the matter. Such provisional measures can be granted ex parte.

- If a provisional measure is sought from a Swiss Court, the claimant has to show:
 - i. that there is an imminent danger for him of suffering disadvantages which cannot be repaired easily
 - ii. that there is a good and valid cause for the main request / claim
 - iii. that these two prerequisites can be substantiated by prima facie evidence.
- Swiss Law distinguishes between the following measures:
 - a) conservatory measures (securing the enforceability of a future judgment)
 - b) regulatory measures (regulating the situation between parties for the duration of the trial)
 - c) provisional performance measures (interim enforcement of an alleged claim).
- Possible conservatory measures are:
 - a) freezing of a bank account
 - b) seizure of assets
 - c) limitation or deprivation of the power to dispose of certain assets.

The most common cases where banks are confronted with demands for such conservatory measures are with Inheritance Recovery Actions (Erbschaftsklage) and Divorce Proceedings (Scheidungsverfahren, Eheschutzverfahren).

- The freezing order / attachment is an official, super-provisional means for safeguarding and coercion with regard to jeopardizes pecuniary claims and is the most effective conservatory measure. According to Art. 271 of the law on Debt Collection and Bankruptcy (Arrest): the debtor has no way to intervene in the

procedure and there is no contradictory hearing after the order has been granted.

The claimant has to show the grounds for an attachment:

- (a) the debtor has no fixed abode, is about to flee or is hiding his assets, is in Switzerland in transit, or
- (b) the debtor does not have his residence / seat in Switzerland and
 - (1) the claim has a sufficient connection to Switzerland or (2) is based on an enforceable judgment or (3) a written acknowledgment of indebtedness, or
- (c) earlier attempts to enforce monetary claims against the debtor have resulted in bankruptcy or certificates of shortfall.

The attachment is a provisional remedy and is forfeited after 10 days unless the plaintiff pursues his claim in a so called validation procedure (Arrestprosequierung).

Banks are requested to disclose all information with regard to the debtor's assets as listed in the freezing order in the moment the appropriate notice is submitted. Assets held nominally by other persons but where the debtor is the beneficial owner have to be included. Also the bank has to disclose the information about the debtor's legal residence or possible delivery address.

However, if the creditor lacks sufficient specification of the assets to be frozen and lists all possible assets at random (searching freezing order, Sucharrest), the bank may refuse the disclosure of information totally.

- "Swiss mini-bankruptcy": creditor bankrupts the debtor in an Anglo-Saxon jurisdiction and immediately thereafter applies ex parte for the appointment of a Swiss bankruptcy trustee, who has reasonably expansive investigative powers.

Advantage: documents can be obtained and bank accounts can be frozen

Disadvantage: slow, burdensome and expensive

- Involving criminal prosecution through starting a criminal prosecution procedure abroad or in Switzerland can lead to the freezing of assets and of their confiscation for the benefit of the creditor.

Advantage: efficient and cheap in cases of criminal dealings

Disadvantage: creditor has no control of proceedings, can take years

3. Making Assets Available

- Foreign decisions on money claims will be enforced by Swiss courts and debt collection bodies providing the court had jurisdiction and the rules of due process have been obeyed.
- Enforcement of foreign money claims is facilitated by the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (LC). Art. 26 (1) LC stipulates the general rule of *ipso iure* recognition of judgments of member states. The initial decision on the application for enforcement is made *ex parte* (Art. 34 (1) LC) and as soon as the foreign judgment is declared enforceable, protective measures may be taken. As the defendant can make objections only in subsequent proceedings, there is an element of surprise,