

International Civil Fraud

Jurisdictional comparisons

First edition 2013

Foreword	Louis Flannery Stephenson Harwood LLP
Austria	Dr. Florian Kremslehner & Mag Julia Mair Dorda Brugger Jordis
British Virgin Islands	Mark Forté & Tameka Davis Conyers Dill & Pearman
Cayman Islands	Nigel Meeson Q.C. & Ben Hart Conyers Dill & Pearman (Cayman) Limited
Cyprus	Stavros Pavlou Patrikios Pavlou & Associates LLC
Denmark	Jakob Lentz Bruun & Hjejle
England and Wales	Leonie Parkin Stephenson Harwood LLP
France	Emmanuel Daoud, Julien Cheval & Clarisse Le Corre Cabinet d'Avocats Vigo
Guernsey	Paul Buckle, Sarah Brehaut & Gregory Tee Ao Hall Legal Specialist
Ireland	Louis Mooney & Declan Black Mason Hayes & Curran
Jersey	Advocate Michael Preston, Dexter Flynn & Chris Le Quesne Voisin Law
Kenya	Nikhil Desai & Nadeem Anjarwalla Anjarwalla & Khanna Advocates
Kuwait	Ahmed Barakat & Hisham Al Qura'an ASAR Legal
Liechtenstein	Thomas Nigg, M.A. HSG Batliner Gasser Rechtsanwältin
The Netherlands	Drs R.M. Thabiso van den Bosch Conway & Partners
Nigeria	Babatunde Fagbohunlu & Kolawole Mayomi Aluko & Oyeboode
Norway	Jørgen Stang Heffermehl & Sven Olav Solberg Simonsen Vogt Wiig
Portugal	Rui Patrício & Filipa Marques Júnior Morais Leitão, Galvão Teles, Soares da Silva & Associados
Russia	Stanislav Danilov, Aleksey Dobrynin & Valery Zinchenko Pen&Paper legal assistance
Spain	Guillermina Ester & Sara Martín Perez Llorca
Sweden	Åke J Fors & Erik Sandström Setterwalls Advokatbyrå AB
Switzerland	Alexander Troller & Sandrine Giroud Lalive
Turkey	Gokmen Baspinar, Ali Ceylan & Ceylan Kuscu Baspinar and Partners
Ukraine	Anna Tyshchenko & Maksym Kodunov Integrities Law Firm
United States	John Fellas & Hagit Elul Hughes Hubbard & Reed LLP

General Editor:
Louis Flannery,
Stephenson Harwood LLP

THE EUROPEAN LAWYER
REFERENCE

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THOMSON REUTERS

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Louis Flannery, Stephenson Harwood LLP

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Published in 2013 by European Lawyer Reference Series,
100 Avenue Road, London NW3 3PF
part of Thomson Reuters (Professional) UK Limited
(Registered in England & Wales, Company No 1679046.
Registered Office and address for service:
Aldgate House, 33 Aldgate High Street, London EC3N 1DL)

A CIP catalogue record for this book is available from the British Library.

ISBN: 9780414027879

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Contents

Foreword	Louis Flannery Stephenson Harwood LLP	v
Austria	Dr. Florian Kremslehner & Mag Julia Mair Dorda Brugger Jordis	1
British Virgin Islands	Mark Forté & Tameka Davis Conyers Dill & Pearman	15
Cayman Islands	Nigel Meeson Q.C. & Ben Hart Conyers Dill & Pearman (Cayman) Limited	25
Cyprus	Stavros Pavlou Patrikios Pavlou & Associates LLC	39
Denmark	Jakob Lentz Bruun & Hjejle	51
England and Wales	Leonie Parkin Stephenson Harwood LLP	63
France	Emmanuel Daoud, Julien Cheval & Clarisse Le Corre Cabinet d'Avocats Vigo	73
Guernsey	Paul Buckle, Sarah Brehaut & Gregory Tee AO Hall Legal Specialist	85
Ireland	Louis Mooney & Declan Black Mason Hayes & Curran	99
Jersey	Advocate Michael Preston, Dexter Flynn & Chris Le Quesne Voisin Law	115
Kenya	Nikhil Desai & Nadeem Anjarwalla Anjarwalla & Khanna Advocates	123
Kuwait	Ahmed Barakat & Hisham Al Qura'an ASAR Legal	133
Liechtenstein	Thomas Nigg, M.A. HSG Batliner Gasser Rechtsanwälte	143
The Netherlands	Drs R.M.T van den Bosch Conway & Partners	149
Nigeria	Babatunde Fagbohunlu & Kolawole Mayomi Aluko & Oyeboode	161
Norway	Jørgen Stang Heffermehl & Sven Olav Solberg Simonsen Vogt Wiig	171
Portugal	Rui Patrício & Filipa Marques Júnior Morais Leitão, Galvão Teles, Soares da Silva & Associados	183
Russia	Stanislav Danilov, Aleksei Dobrynin & Valery Zinchenko Pen&Paper legal assistance	191
Spain	Guillermina Ester & Sara Martín Perez Llorca	205
Sweden	Åke J Fors & Erik Sandström Setterwalls Advokatbyrå AB	221
Switzerland	Alexander Troller & Sandrine Giroud Lalive	233
Turkey	Gokmen Baspinar, Ali Ceylan & Ceylan Kuscu Baspinar and Partners	243
Ukraine	Anna Tyshchenko & Maksym Kodunov Integrities Law Firm	253
United States	John Fellas & Hagit Elul Hughes Hubbard & Reed LLP	261
Contact Details		275

Switzerland

Lalive

Alexander Troller & Sandrine Giroud

1. THE BASIS OF CIVIL FRAUD OBLIGATIONS UNDER SWISS LAW

Switzerland is a civil law jurisdiction and legal obligations are, as a rule, statutorily defined. The concept of civil fraud as the term is understood in most common law jurisdictions does not exist as such under Swiss law. However, several civil causes of action in Switzerland bear relation to the civil fraud concept.

Fraud primarily relates to a criminal offence provided for in Article 146 of the Swiss Criminal Code (SCrimC), which can give rise to civil compensation to the victim of criminal fraud under certain conditions (see section 2).

Swiss law also provides for other offences which involve components of fraud, for example:

- misappropriation;
- unlawful use of financial assets;
- maliciously causing financial loss to another;
- criminal mismanagement;
- exploitation of knowledge of confidential information;
- bankruptcy and debt collection felonies or misdemeanours;
- forgery.

In the context of contracts, fraud is also sanctioned by Article 28 of the Swiss Code of Obligations (SCO). Further, fraud may be understood in a more general sense to encompass manifest abuse of a right which is prohibited by Article 2 of the Swiss Civil Code (SCivC) and can give rise, in very limited cases, to liability based on trust. Each of these different manifestations of the notion of fraud includes civil law components which could give rise to civil compensation under certain conditions.

2. THE MAIN ELEMENTS OF A CAUSE OF ACTION IN SWISS BASED ON CIVIL FRAUD

There is no concept of civil fraud as such under Swiss law (see section 1). However, Swiss law provides for several causes of action which bear relation to the common law understanding of civil fraud:

- civil compensation for criminal fraud: the essential elements are (*Article 146 of the SCrimC*):
 - an individual, with a view to securing an unlawful gain for himself or another, wilfully induces another person into a mistaken belief by misrepresentation or concealment of the truth, or wilfully reinforces a mistaken belief; and

- the inducement causes that person to act to the detriment of his or another's financial interests.

As a wrongful act, criminal fraud also constitutes a civil offence giving rise to civil liability in tort (*Articles 41 et seq., SCO*), provided the other conditions for establishing liability in tort are established, that is, the existence of:

- damage;
 - fault; and
 - a causal link between the wrongful act and the damage.
- contractual fraud: The essential elements are:
 - the creation or exploitation of a mistake;
 - the inducement of the other contracting party to enter into a contract on the basis of this mistake; and
 - the declaration of the mistaken party, within one year of discovery of the fraud, that they intend not to honour the contract or seek restitution of the performance made.

The following are examples of contractual fraud:

- the affirmation of false facts;
- the concealing of true facts;
- sustaining a person's mistaken belief by concealment.
- certain acts of corruption (private or public).

Unlike criminal fraud, contractual fraud does not require intention to harm.

- manifest abuse of a right: there is a general duty of good faith which requires that every person must act in good faith in the exercise of rights and in the performance of obligations (*Article 2, SCivC*). This provision states further that the manifest abuse of a right is not protected by law. There exists accordingly an implied principle prohibiting the abuse of a right. This prohibition presupposes the existence of a right. However, in limited circumstances, the mere prohibition may serve as an independent cause of action, based on liability for breach of trust (eg violation of pre-contractual rights). Liability based on trust lies somewhere between contractual and non-contractual liability, and is contingent on the parties being in a 'special legal relationship'. It is the liability of a third party outside of a contractual relationship, for an expectation which is created but subsequently not met. If a party makes specific arrangements based on the trust generated by another party, the party who created the relevant expectation may be held liable for any resulting damage (provided there is a causal link between the unsatisfied expectation and the relevant damage).

3. REMEDIES AVAILABLE UNDER SWISS LAW IN RELATION TO CIVIL FRAUD

The remedies available depend on the cause of action:

- civil compensation for criminal fraud: the injured party is, as a rule, entitled to compensation for the damage incurred;
- contractual fraud: when invoked in time (see section 6), contractual fraud may result in the nullity of the contract from the time of execution. This interpretation, although contested by the majority of Swiss scholars, is upheld by the Swiss Supreme Court. As a result, all acts undertaken on

the basis of the subsequently annulled contract must be considered as void. In this case, the victim of the fraud can claim for:

- the original situation to be restored by way of an action to reclaim (*Articles 641 et seq., SCivC*);
- restitution for unjust enrichment (*Articles 62 et seq., SCO*).

The ratification of a contract made voidable by reason of fraud does not automatically exclude the right to claim damages (*Article 31, SCO*);

- manifest abuse of a right: the injured party is, as a rule, entitled to compensation for the damage incurred (see section 2).

4. DAMAGES; BASIS OF CALCULATION

In the context of civil fraud, there is no uniform rule as to the damages that can be claimed. Damages depend on the cause of action on which the claim is based. In certain cases, damages compensate the harm caused (eg in cases of ratification of a contract entered into under fraud) and in other cases damages aim to put the injured party into the position they would be in if the harm had not occurred.

Swiss statutory law does not provide for a definition of damage. Swiss courts and scholars generally consider damage to constitute the involuntary diminution of a person's assets (eg diminution of assets, augmentation of liabilities, non-augmentation of assets or non-diminution of liabilities). All damage or loss having an adequate causal link with the damaging event can be claimed (eg loss of profit or expenses incurred by the aggrieved party).

Further, damage is generally understood as economic damage (ie an arithmetical notion), by contrast to normative damage (ie a value judgement of damages). Therefore, the courts have greatly resisted normative damages such as commercialisation damage (ie the commercial value of goods according to their market value) or frustration damage (ie the loss of the benefit of expenditure already made, for example for cancellation of holidays already paid for).

5. AVAILABLE INTERIM RELIEF

Types of claim

Swiss law distinguishes between:

- non-monetary claims, enforcement of which is regulated by the Swiss Code of Civil Procedure (SCCP);
- monetary claims, enforcement of which is governed by the Swiss Debt Enforcement and Bankruptcy Act (SDEBA).

Interim relief, before a claim has been filed or during the proceedings, can be requested by way of:

- interim measures for non-monetary claims;
- attachment for monetary claims.

Interim measures

Swiss courts can order interim relief suitable to prevent imminent harm, in support of a non-monetary claim based on Articles 261 et seq. of the SCCP. The applicant for interim relief must establish:

- the likelihood that they are entitled, on the merits, to the same relief which the requested interim measure is intended to protect (ie the likely

existence of a valid cause of action on the merits);

- that there is impending harm to the rights on which the applicant relies; and
- that if no interim relief is granted, the detriment resulting from the injury may not easily be remedied, leading to irreparable harm.

In practice, most applications for interim relief are rejected due to the absence of a risk of irreparable harm. This is primarily due to the fact that purely financial losses are generally not considered an irreparable harm, as an award of damages usually constitutes an adequate remedy. Further, interim measures must be proportionate and appropriate after due consideration and a balance of each party's interests. Compliance with these criteria must be established *prima facie*. The threshold is therefore lower than required to prove the full case (ie, with certitude), but requires more than mere allegations.

The interim relief ordered by the court can take the form of:

- an injunction;
- an order to remedy an unlawful situation;
- an order to a registry or to a third party;
- a performance in kind;
- the remittance of a sum of money.

In practice, the registration of property rights in a public register such as the land register is often requested. Interim measures can also be requested to prevent a party from disposing of assets such as company shares or movable property. In particularly urgent cases, especially where there is a risk that the enforcement of the measure will be frustrated, the court can order the interim measure immediately and without hearing the opposing party (*ex parte*) (Article 265, SCCP). Further, while Swiss civil procedure does not provide for pre-trial discovery, Swiss civil procedural rules only allow evidence to be taken before initiation of legal proceedings in cases where (Article 158, SCCP):

- evidence is at risk;
- the applicant has a justified interest.

Attachment

In the context of a monetary claim, assets can be frozen by way of attachment proceedings (Articles 272 *et seq.*, SDEBA). Attachment is granted *ex parte*, but must then be validated *inter partes*. The applicant must demonstrate the *prima facie* existence of:

- a claim against the debtor;
- assets of the debtor which may be attached; and
- one of the specific grounds for attachment provided by law, for example:
 - the debtor does not live in Switzerland and the claim has sufficient connection with Switzerland or is based on a recognition of debt;
 - the creditor holds an enforceable title against the debtor.

6. BARS TO RELIEF FOR CIVIL FRAUD

6.1 Delay

Swiss law does not specifically bar a civil fraud claim filed with delay provided the claim has been filed within the statutory limitations applicable to the underlying cause of action (see section 6.3).

However, there is a general duty to mitigate one's damages. This requires that the aggrieved party limits the adverse consequences of the damaging event, such as a fraudulent act, by taking all measures that can reasonably and objectively be expected from the aggrieved party. In some cases, this could mean acting without delay.

The legal basis of this duty is subject to scholarly debate, but it is generally accepted that it rests on the principle of good faith (*Article 2, SCivC*) (see section 2). The Swiss Supreme Court has generally considered that a violation of a duty to mitigate one's damages affects the calculation of damages. In these cases the court has reduced the compensation awarded in proportion to the amount of damage that could have been prevented. In cases of grave fault on the part of the aggrieved party in mitigating their damage, the Swiss Supreme Court has held that the causation link between the damaging act and its consequence had been severed. This leaves the aggrieved party bearing the consequences of the damage that could have been prevented.

6.2 (Lack of) good faith

The general duty of good faith provides that the manifest abuse of a right is not protected by law (*Article 2, SCivC*) (see section 2). The threshold is a manifest violation. Good faith as such is not a requirement for claiming relief for civil fraud under Swiss law. In particular, a plea of non venire contra *factum proprium* (the principle that a person must not contradict their own previous conduct) only bars a claim for civil fraud if both:

- the person's original conduct induced another person into carrying out a certain action; and
- because of a later change in conduct that other person incurred a damage.

6.3 Applicable limitation periods

The initiation of civil proceedings is limited by the statute of limitations applicable to the underlying claim.

Tort

In the context of liability for tort, a claim for damages or satisfaction becomes time-barred one year from the date on which the injured party became aware of the loss or damage, and of the identity of the person liable for it (or at the latest 10 years after the date on which the loss or damage was caused). However, if the action for damages arises from an offence for which criminal law provides a longer limitation period, the longer period also applies to the civil law claim. Without a sentencing or acquittal by the criminal courts, a civil court hearing a related civil law claim can freely decide whether the relevant actions are tantamount to a criminal offence. As a result, it can be strategically useful to file criminal proceedings in support of civil proceedings, to preserve the statute of limitation.

Breach of contract

As a rule, claims which arise out of a breach of contract become time-barred after 10 years unless otherwise provided by federal civil law (*Article 127, SCO*).

Some specific contractual claims become time-barred after five years, for example claims in connection with:

- work carried out by tradesmen and craftsmen;
- purchases of retail goods;
- medical treatment;
- professional services provided by lawyers, solicitors, legal representatives and notaries;
- work performed by employees for their employers.

However, specific contractual claims become time-barred after a shorter period. For example, the following are time-barred after two years:

- a claim for breach of warranty of quality and fitness related to a chattel sale (*Article 210, SCO*);
- a customer's claim for defects in a contract for work (*Article 371(1), SCO*).

In general, the limitation period runs as soon as the debt is due (*Article 130, SCO*). The limitation period is interrupted if the (*Article 135 CO, SCO*):

- debtor acknowledges the claim;
- debtor makes interest payments or partial payments; or
- creditor initiates debt enforcement proceedings.

The effect of an interruption is that a new limitation period starts from the date of the interruption (*Article 137, SCO*).

In relation to contractual fraud, the party acting as a result of a fraud must declare within one year to the other party that they intend not to honour the contract or seek restitution for the performance made. If they fail to make this declaration, the contract is deemed to have been ratified. The one-year period runs from the date on which the error or fraud was discovered (*Article 31, SCO*). A subsequent claim for restitution for unjust enrichment becomes time-barred one year after the date on which the injured party learned of the claim and, in any event, 10 years after the date on which the claim first arose (*Article 67, SCO*).

6.4 Position of good faith purchaser for value without notice (innocent third parties)

A person becomes the owner by adverse possession of a chattel belonging to another person if he both (*Article 728, SCivC*):

- has possessed the chattel uninterruptedly and without challenge for five years;
- believes in good faith that he owns it.

This applies, for example, to negotiable securities. A person who takes possession of a chattel in good faith, in order to become its owner or to acquire a limited right in rem, is protected even if the chattel was entrusted to the transferor without any authority to effect the transfer (*Article 933, SCivC*).

The possessor whose chattel has been stolen or lost, or who has otherwise been dispossessed of it against their will, can reclaim it from any possessor within a period of five years (*Article 934, SCivC*). By contrast, a person who has not acquired a chattel in good faith can be required by the previous possessor to return it at any time (*Article 936, Swiss Civil Code*).

In the context of contractual fraud, a party who is the victim of fraud

by a third party remains bound by the relevant contract unless the other contracting party knew or should have known of the fraud at the time the contract was concluded (*Article 28(2), SCO*).

7. ASPECTS OF PLEADING FRAUD IN SWITZERLAND

7.1 Lifting the corporate veil

The corporate veil can be lifted where the economic reality points to confusion between separate legal entities or individuals (principle of substance over form). This argument can be raised in the context of a claim based on manifest abuse of a right (see section 2). For example, the corporate veil could be lifted in respect of a sole shareholder abusively hiding behind a corporate entity. However, the concept of lifting the corporate veil is applied restrictively by Swiss courts.

7.2 Settlements/exclusion clauses

A party who was the victim of fraud when entering into a settlement can claim contractual fraud (see section 2) and the corresponding remedies may apply (see section 3).

Agreements purporting to exclude in advance liability for unlawful intent or gross negligence are void (*Article 100, SCO*). A claim based on fraud may serve to demonstrate the existence of unlawful intent.

7.3 Extension of limitation

In cases where it is possible to demonstrate that the acts in question are tantamount to a criminal offence for which criminal law provides a longer limitation period, the longer period also applies to the civil law claim (see section 6.3).

7.4 Punitive damages

Punitive damages are not awarded in Switzerland.

7.5 Standard of proof

The standard of proof required is in principle that of certitude.

7.6 Lawyers' duties when pleading fraud

There are no special duties applicable to lawyers when pleading fraud in addition to the professional rules of conduct applicable to lawyers in general.

8. BASIC REQUIREMENTS IN RELATION TO ISSUING PROCEEDINGS; APPLYING FOR INJUNCTIVE OR INTERIM RELIEF; OR SERVING PROCEEDINGS ABROAD

Basic requirements for the commencement of proceedings

Proceedings before Swiss courts are commenced with an application for conciliation or a statement of claim (*Article 62, SCCP*). The filing of this application interrupts the statute of limitations, regardless of the actual date of service on the defendant.

In financial disputes with a value in dispute of at least CHF100,000, parties

can mutually agree to waive any attempt at conciliation (*Article 199(1), SCCP*). A claimant can also unilaterally waive an attempt at conciliation if, among other things, the defendant's (*Article 199(2), SCCP*):

- registered office or domicile is abroad;
- residence is unknown.

Conciliation proceedings are initiated by an application for conciliation. The application can be submitted in writing or orally before the conciliation authority (*Article 202, SCCP*). The application must state:

- the identity of the opposing party;
- the prayers for relief; and
- a description of the matter in dispute.

The description of the matter in dispute can be very general, and an applicant is not required to set out any legal arguments. However, the prayers for relief must be as precise as possible. This is because they can only be modified at a later stage of the proceedings if either (*Article 227, SCCP*):

- there is a factual connection between any new or amended prayers for relief and the original prayers for relief;
- the opposing party consents to the amendment.

The conciliation authority must immediately serve the opposing party with the application and summon the parties to a hearing (*Article 202(3), SCCP*). The conciliation hearing must take place within two months of receipt of the application. The conciliation authority will consider the physical records presented to it and may also conduct an on-site inspection, if an inspection is necessary for the parties to reach an agreement. With the parties' consent, the conciliation authority can hold additional hearings, although the duration of the conciliation proceedings must not exceed 12 months (*Article 203, SCCP*).

In principle, the parties must attend the conciliation hearing in person. Exemptions are available for persons domiciled abroad. The conciliation proceedings are confidential. The statements of the parties at the hearing must not be recorded or used subsequently in court proceedings, and the hearing is not public.

If the parties do not reach an agreement at the hearing, the conciliation authority will grant an authorisation to proceed, after which the claimant has three months to file a statement of claim.

The submission must be filed with the first instance court having territorial jurisdiction (eg by default at the place of domicile or seat of the defendant) in the form of paper documents or electronically. In the case of electronic transmission, the document containing the submission and its enclosures must be certified by the recognised electronic signature of the sender. The court can request that the electronically transmitted submission and annexes be filed subsequently in paper form.

The statement of claim must include:

- the designation of the parties and their representatives, if any;
- the prayers for relief;
- a statement of the value in dispute;
- the allegations of fact;
- notice of the evidence offered for each allegation of fact; and

- the date and signature.

In addition, the statement of claim must be supported by the following documents (*Article 221, SCCP*):

- a power of attorney where a party is represented;
- the authorisation to proceed or the declaration that conciliation is being waived, if applicable;
- the available physical records to be offered in evidence; and
- a list of the evidence offered.

Basic requirements for the applying for injunctive or interim relief

Interim relief proceedings are initiated by an application (*Article 252, SCCP*).

The proceedings are summary (*Article 248, SCCP*), with less formal procedural rules. In simple or urgent cases, the application can be filed orally on record.

By contrast to ordinary proceedings, there are no conciliation proceedings for summary proceedings (*Article 198, SCCP*).

Basic requirements for serving proceedings abroad

Swiss judicial or extrajudicial documents are served abroad within the framework of international treaties to which Switzerland is party, such as the:

- HCCH Convention on Civil Procedure 1954 (Hague Civil Procedure Convention).
- HCCH Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters 1965 (Hague Service Convention).

Service abroad can also be processed through bilateral treaties such as those with Austria, Belgium, France and Germany. In the absence of any multilateral or bilateral treaty, the Hague Civil Procedure Convention applies to a request for judicial assistance for service of documents in Switzerland (*Article 11a(4), Swiss Private International Law Act (SPILA)*). The Hague Civil Procedure Convention also applies by analogy to requests originating from Switzerland.

The service of judicial documents is, by law, a prerogative of the courts. As a result, parties have no discretion as to when a claim is served on the defendant. Courts will, as a rule, serve judicial documents such as applications for conciliation or statements of claims immediately on receipt. Service abroad can take several months depending on the legal framework in place with the requested foreign jurisdiction. Statistics on the average time required for service abroad are available on the website of the Swiss Federal Office of Justice (www.rhf.admin.ch/rhf/fr/home/rhf/index/laenderindex.html).

To avoid delay in the proceedings in cases where a party is domiciled or has its registered address abroad, Swiss courts usually order the party to elect a domicile in Switzerland.

9. PROCEDURE AND REQUIREMENTS FOR ENFORCING INTERIM INJUNCTIONS FROM ABROAD IN SWITZERLAND

Foreign decisions are recognised and enforced in Switzerland under multilateral or bilateral treaties in force between Switzerland and the state

in which the corresponding decision was issued. In this respect, the most important instrument in force in Switzerland is the Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters 2007 (Lugano Convention).

Swiss courts assessing a request for enforcement of a court decision (including an interim measure) rendered in one of the member states to the Lugano Convention must declare that court decision immediately enforceable, if certain formal conditions are met. Swiss courts cannot review the merits of the case. However, a foreign decision rendered under *ex parte* proceedings are only enforced in Switzerland once the defendant has been heard, or has had the opportunity to be heard (*Swiss Supreme Court Decision of 30 July 2003 ATF 129 [2003] III 626*). Further, measures designed to secure the enforcement of foreign decisions are directly available under Article 47 of the Lugano Convention.

If no treaty applies, SPILA governs recognition and enforcement proceeding. A foreign decision will be recognised in Switzerland if:

- the judicial or administrative authorities of the state in which the decision was rendered had jurisdiction;
- no ordinary appeal can be lodged against the decision or the decision is final; and
- there are no grounds for refusal, as exhaustively listed in the SPILA (such as violation of Swiss public policy, defective service or *res judicata*).

It is debated whether foreign interim measures could be recognised and enforced in Switzerland under the SPILA regime, as the requirement that a decision is final is not satisfied in these cases. There is no reliable published court practice with regard to the recognition of interim or protective measures outside the Lugano Convention. Rather than attempting to have a foreign interim measure recognised and enforced, creditors in these cases should seek appropriate relief where the assets are located, as is the case in Swiss attachment proceedings. This is usually a faster and cheaper approach.