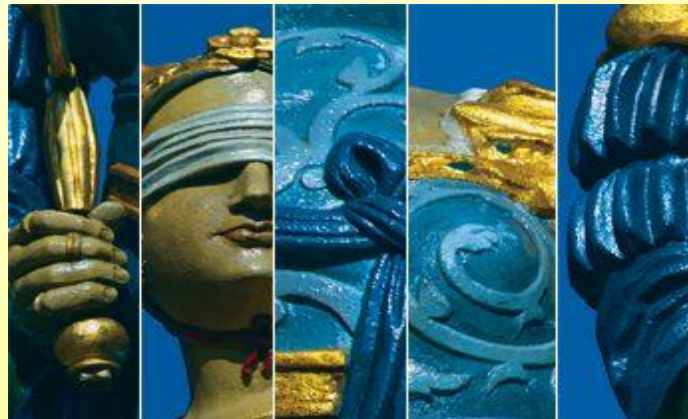


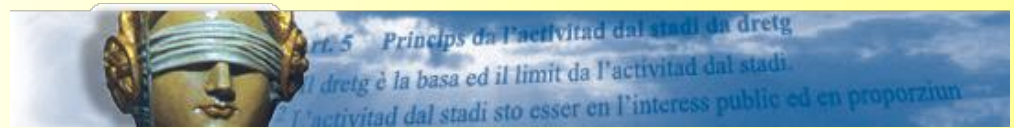


Schweizerische Eidgenossenschaft
Confédération suisse
Confederazione Svizzera
Confederaziun svizra

Federal Department of Justice and Police FDJP
Federal Office of Justice FOJ
Division for International Legal Assistance

Enforcement of foreign forfeiture or confiscation orders in Switzerland

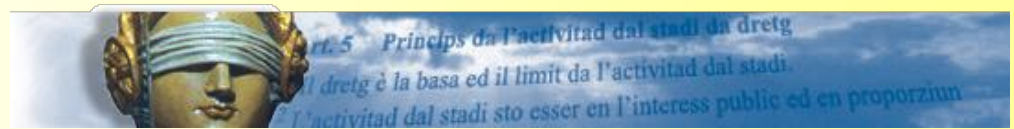




Introduction

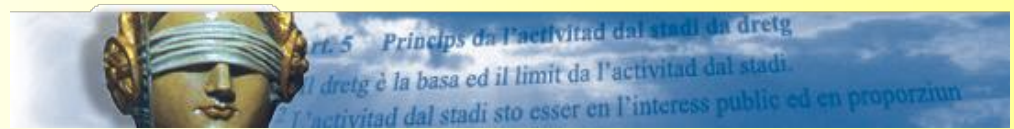
No free man shall be (...) stripped of his rights or possessions, (...) except by the lawful judgement of his equals or by the law of the land. (Magna Carta, 1215)

If any one of the confederates shall spoil another of his goods, or injure him in any way, the goods of the guilty one (...) shall be seized in order to pay damages to the injured person, according to justice. (Federal Charter, 1291)



Presentation outline

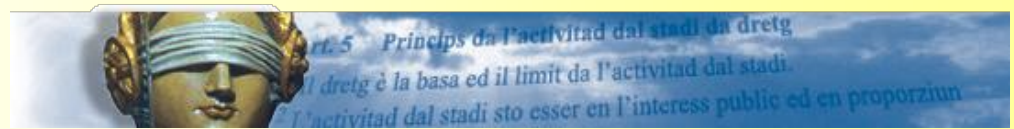
1. Swiss conception of assets confiscation;
2. Domestic provisions for the execution of foreign confiscation requests;
3. Art. 74a of the International Mutual Assistance in Criminal Matters Act (IMAC): The confiscation's Swiss Army Knife;
4. Swiss experiences;
5. Practical tips.



1. Swiss conception of assets confiscation

Legal basis: art 70 of the Swiss Criminal Code

- Measure, not penalty (*crime shall not pay*);
- Possible even if nobody is punishable;
- Criminal standard of proof;
- No reverse burden of proof (excepted for OC);
- Limited to assets linked with the crime;
- Subsidiary to restitution to victims;
- In rem approach - bona fide third party protected.



2. Domestic provisions for the execution of foreign requests

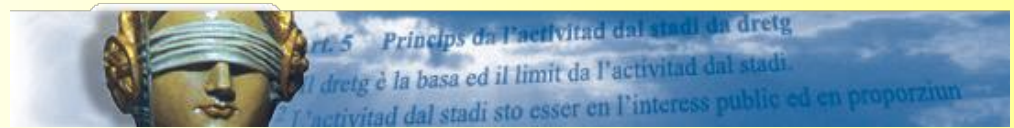
Confiscation: no self-executing clause in any Treaty



Application of the domestic law: International Mutual Assistance in Criminal Matters Act (IMAC):

- Art 74a IMAC: Simple and efficient.
- Art 94 IMAC: Complicated / hasardous (Exequatur)

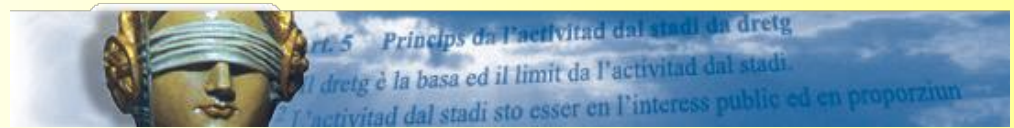
IMAC proceedings independent of Swiss criminal confiscation proceedings !



3. Art. 74a IMAC: the confiscation's Swiss Army Knife

Art. 74a IMAC allows the Swiss authorities:

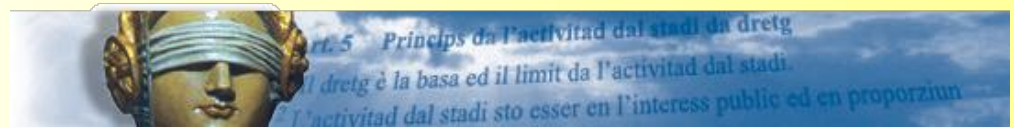
1. Upon request of a foreign authority;
2. To hand over assets or objects;
3. That have been previously seized / frozen;
4. To the purpose of confiscation or return to the person entitled;
5. In execution of a foreign judicial decision.



3. Art. 74a IMAC: conditions

Conditions to be fulfilled by the order:

- Issued by a Court;
- Final and executable;
- Fair trial / rights of the owner of the assets;
- Precise designation of the confiscated assets;
- Link between the offence and the assets.

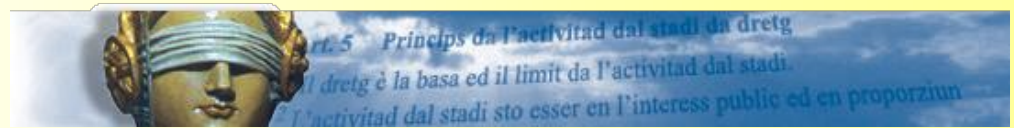


3. Art. 74a IMAC: subjects

Assets or objects that may be handed over:

- Instruments used to commit the offence;
- Products or profits of the offence;
- Replacement value (*# substitute assets*);
- Contributions which served to instigate the offence or recompense the offender.

Identity of the assets' holder is irrelevant (in rem approach).



3. Art. 74a IMAC: third parties

Handing over of the assets suspended if:

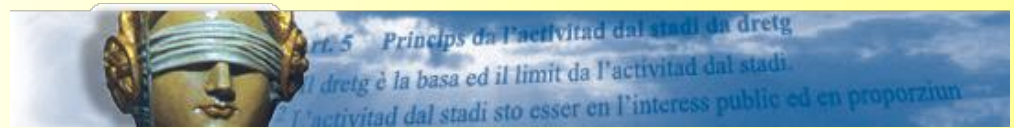
1. A person not involved in the offence
2. shows probable cause that
3. he has acquired in good faith specific rights
4. in Switzerland (*not for Swiss residents*).



Third party not meeting conditions 1-4 is dismissed;

Third party meeting conditions 1-4 has to ask, within time limit, a Swiss Court to recognize his claim;

Handing over refused if Court recognizes claim.



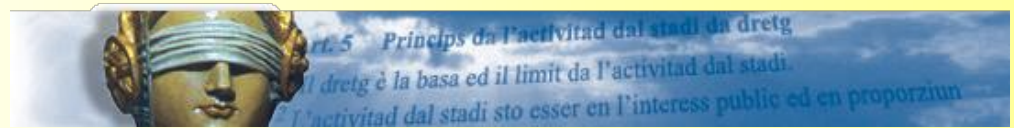
3. Art. 74a IMAC: procedure

The Swiss authorities:

1. Check whether the conditions are fulfilled;
2. Notify the assets custodian;
3. Notify the assets owner (if in Switzerland);
4. Order the handing over of the assets; or
5. Suspend the handing over (rare).

Appeals: 30 days to Federal Criminal Court; then
10 days to Supreme Court.

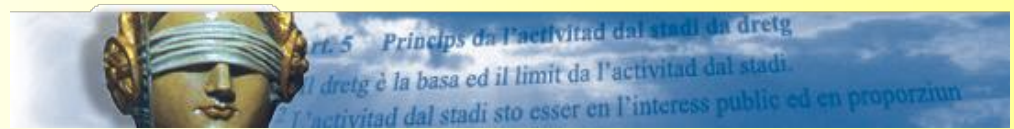
Appellants: Assets owner and dismissed third party



3. Art. 74a IMAC: restrictions

Civil confiscation orders will not be executed if:

- No prosecution, without reasonable grounds;
- Acquittal / charges dropped;
- Reversed burden of proof (excepted OC);
- Government burden of proof inferior to 51%;
- Confiscation of banking accounts without prior transmission of the banking documentation;
- Confiscation of legitimate assets (value based confiscation / substitute assets): exequatur.



4. Swiss experiences (1/2)

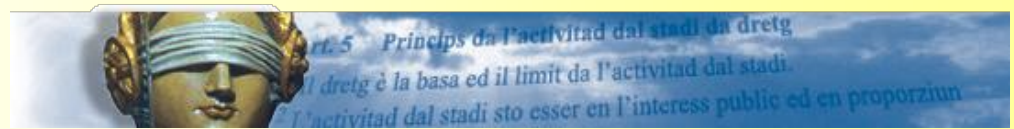
The K. case: (ATF 132 II 178)

US civil forfeiture proceedings, assets in CH.
Assistance suspended by Supreme Court:

1. Common objectives: “crime shall not pay”;
2. Civil forfeiture is a criminal matter;
3. Civil forfeiture compatible with Swiss law if:
 - a) Burden of proof not reversed; and
 - b) Link between assets and the offence;

But:

4. Repressive competence must be affirmed;
5. Clarification as to victims' compensation.



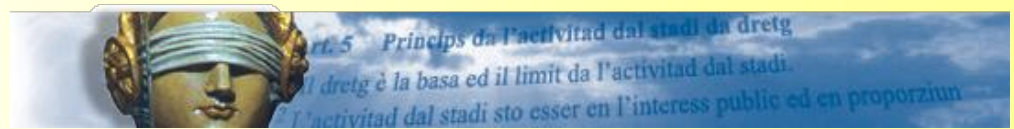
4. Swiss experiences (2/2)

The Ethiopian Coffee case (ATF 129 II 453)

- Investigation in Ethiopia for illegal exportation of coffee and embezzlement.
- Embezzlement proceeds frozen in Switzerland.
- Swiss assets confiscated by Ethiopia for:
 1. Compensation of Ethiopian State, then
 2. Compensation of the embezzled victim.

FOJ, then Supreme Court refused assistance:

1. No link between assets and “coffee” offence;
2. Victims must be compensated first.

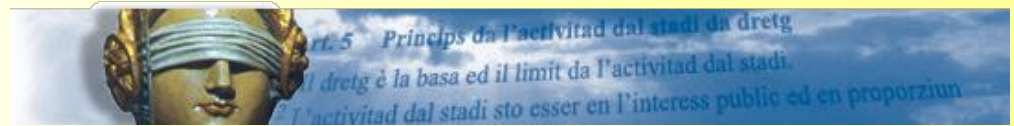


5. Practical tips

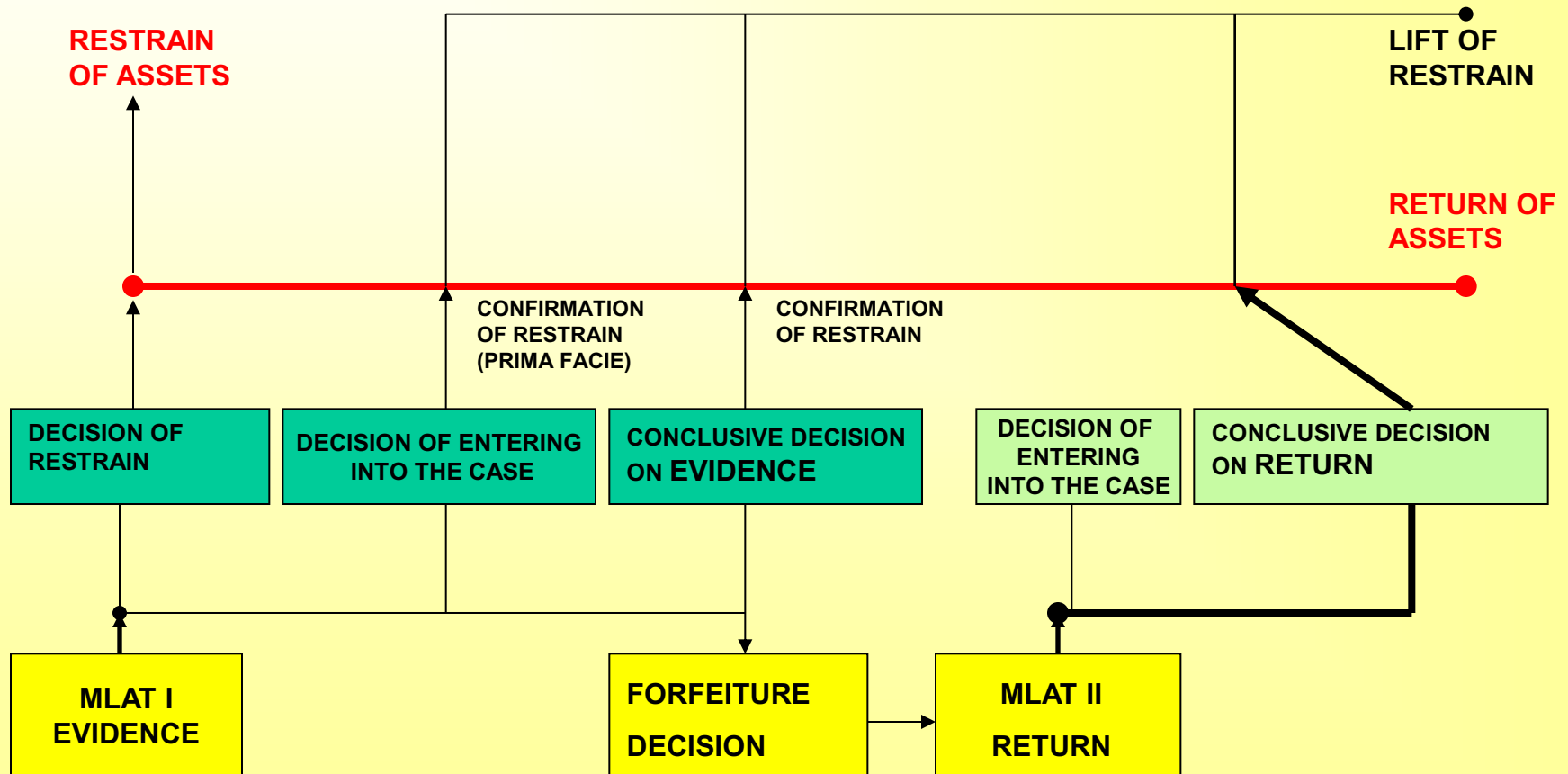
- Ask first for the documentation and the freeze;
- After receiving the documents, notify bank and formal account holder about the confiscation proceedings;
- Obtain a confiscation order designating:
 - a) the assets to be confiscated;
 - b) their link with the offence;

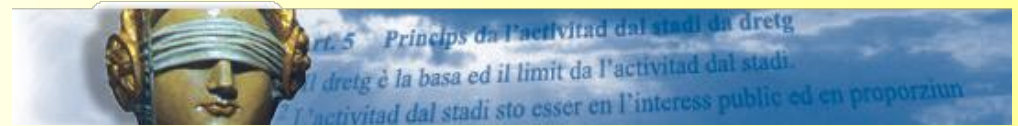
if not possible

 - c) describe a) and b) in the MLA request;
- Explain the reasons for which criminal confiscation has not been used;
- If victims, explain their rights to compensation.



Mutual Legal Assistance Proceeding: Restraining and returning Assets in Switzerland





Questions?

