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PERSPECTIVES

SWISS ATTACHMENT LAW: OVERVIEW AND RECENT DEVELOPMENTS

BY **ANDRÉ BLOCH**

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Attachment or freezing orders are an important element of the Swiss legal system. The existence and granting of such measures enables creditors to safeguard the enforcement of monetary claims against debtors. Attachment orders ensure that debtors may not dispose of (frozen) assets before and as long as legal proceedings are pending and that they comply with monetary obligations according to the verdict resulting from the ordinary proceedings. Attachment

orders, thus, ensure that creditors are not deprived of the fruits of their possible legal victory.

The following comments describe some main aspects of the Swiss attachment law system with a special emphasis on attachment requests against debtors that have assets but no domicile in Switzerland.

Attachment law in Switzerland

First of all, it should be noted that Swiss attachment law operates 'in rem' and not 'in



personam'. In other words, the attachment order is not directed against the debtor in person, but towards the debtor's assets which need to be specified in the course of the attachment proceedings.

A creditor may receive an attachment of specified assets of a debtor in case he shows prima facie evidence that: (i) he has a claim against the debtor which is due and unsecured; (ii) there are assets at hand belonging to the debtor; and (iii) one of the statutory grounds for an attachment order is met.

A statutory ground for obtaining an attachment order is met in case the creditor shows prima facie evidence that: (i) the debtor has no permanent domicile; (ii) the debtor is attempting to conceal assets or is planning to leave Switzerland to evade the fulfilment of its obligations; (iii) the debtor is passing through Switzerland or conducts business in Switzerland on markets and trade fairs; (iv) the debtor has no domicile in Switzerland and the claim has a sufficient connection with Switzerland or is based on a recognition of debt by the debtor; (v) the creditor is in possession of a provisional or final certificate of shortfall against the debtor; or (vi) the creditor is in possession of an enforceable judgment against the debtor.

'Prima facie evidence' means that it is sufficient if the judge considers the alleged facts and the creditor's claim as credible. The creditor does not have to present conclusive evidence establishing the merits of his claim.

The application for attachment has to be filed at the court where the assets are located or where debt collection proceedings must be initiated. Attachment proceedings are carried out on an ex parte (unilateral) basis and in form of expedited summary proceedings. Therefore, the debtor will only be informed about the existence of a request for attachment once the attachment has been granted. In case the request is dismissed, the debtor will not be informed about the unsuccessful application for an attachment order.

In case the request for attachment is granted by the competent court, the debt enforcement office executes the attachment order and seizes the debtor's property to the extent as requested and specified by the creditor and granted by the court. The debtor has the right to challenge the attachment order by filing an objection. The filing of an objection gives the debtor the initial opportunity to be heard. The competent court will confirm, vary or reverse the attachment decision.

The creditor has to uphold the attachment order by commencing debt enforcement proceedings against the debtor within 10 days of service of the attachment certificate. If the debtor files an objection against the commencement of debt enforcement proceedings, the creditor must continue to uphold the attachment order either by filing the ordinary claim against the debtor or by setting aside the debtor's objection in summary proceedings.

Attachment order against debtors without domicile in Switzerland

Switzerland is one of the most important financial centres in the world. A large number of persons residing outside of Switzerland – individuals as well as foreign entities – hold assets in Switzerland. Therefore, attachment orders issued by a Swiss court against debtors which have assets but no domicile in Switzerland can be a very helpful and important instrument for creditors. The next sections deal with this topic in more detail.

Attachment order in case of sufficient connection with Switzerland or existence of recognition of debt

Assets in Switzerland belonging to a debtor with domicile outside Switzerland can be attached if the claim for which the attachment is sought has a sufficient connection with Switzerland or is based on a recognition of debt by the debtor.

There has been and still is a broad discussion regarding the interpretation of the term 'sufficient connection with Switzerland'. According to current Swiss practice, a 'sufficient connection with Switzerland' is given, *inter alia*, if: the creditor has his domicile in Switzerland; the claim is governed by Swiss law; Swiss courts have jurisdiction over the claim; the contract on which the claim is based was negotiated and entered into in Switzerland; the place of performance for at least one of the principal obligations according to the contract is

in Switzerland; or, in case of damage claims, if the tortuous act was committed in Switzerland.

In the end, the question whether a 'sufficient connection with Switzerland' is given depends on the specific circumstances of the case in question.

No 'sufficient connection with Switzerland' is required if the creditor is in possession of an explicit acknowledgment of debt by the debtor.

The recognition of debt must either be signed by the debtor or stipulated in a notarised deed. Under certain circumstances, contracts concluded in writing between the creditor and the debtor and signed by the debtor, for instance a sale agreement or loan agreement, may also qualify as a recognition of debt.

Attachment order based on an enforceable judgment

A creditor may request an attachment order if he is in possession of an enforceable judgment against the debtor. This rule came into effect on 1 January 2011, and does not make any distinction between Swiss and foreign judgments and whether the debtor is domiciled in Switzerland or outside. The aforementioned provision gives, therefore, an additional alternative for creditors against debtors which have no domicile but assets in Switzerland. The mere fact that a creditor is in possession of an enforceable foreign judgment against a debtor

without domicile in Switzerland may be sufficient for the granting of an attachment order in Switzerland.

Any kind of foreign enforceable judgment enables the creditor to request an attachment order. In particular and according to a majority of Swiss doctrine and recent Swiss jurisprudence it does not make any difference whether the foreign court

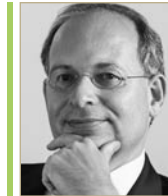
“The best legal system is useless if creditors are too late with their attempt to freeze the assets of their debtors. Therefore, it is strongly recommended that parties verify potential options for getting an attachment order in due course.”

decision was rendered by a state which is member of the Lugano Convention on Jurisdiction and the Enforcement of Judgments and Commercial Matters (Lugano Convention) or whether the verdict was issued by a state outside of the Convention. Also, Swiss and foreign enforceable arbitral awards qualify as enforceable judgment.

Conclusion

The short description of some key elements of the Swiss attachment law system shows that

Switzerland is an interesting place for creditors who are trying to protect their rights by applying attachment measures. However, the best legal system is useless if creditors are too late with their attempt to freeze the assets of their debtors. Therefore, it is strongly recommended that parties verify potential options for getting an attachment order in due course. **CD**

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