Asset Tracing and Freezing Orders: Switzerland

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Switzerland is home to more than 260 banks, with an aggregate balance sheet total of approximately 3 trillion Swiss francs.[1] A considerable part of the assets managed in Switzerland belong to non-domestic clients. This makes Switzerland not only a major financial centre, but also a hub for the global wealth management business. Against this backdrop, it goes without saying that obtaining provisional relief affecting property in Switzerland, and bank accounts in particular, is of great significance from a practical point of view.

A creditor aiming to enforce its claim against an unwilling debtor will be confronted with the need for information about the debtor's assets. Consequently, this article outlines in a first instance the means available in Switzerland to obtain such information. In a second step, the mechanics concerning a freezing or attachment order in Switzerland are presented.

Asset tracing

The assets targeted by attachment orders in an international context are most often bank accounts of the debtor. In essence, Swiss law confronts the creditor with two obstacles it has to overcome when tracing assets, these being banking secrecy[2] and the prohibition of 'fishing expeditions'[3] (ie, unspecific investigation attempts into someone else's data).

Asset tracing, therefore, starts with the information already available to the creditor. In many cases, the creditor is in possession of details of the debtor's bank accounts through earlier correspondence or payments. Such initial information about the debtor's assets considerably enhances the chances to eventually obtain an attachment.

In Switzerland, the potential options available to a creditor to obtain additional information include civil and procedural information rights as well as information rights in debt enforcement proceedings.

Civil remedies

Swiss law provides no general civil remedies enabling a creditor to request information about the debtor's assets from third parties (eg, from banks). However, certain information rights exist in particular circumstances. Such information rights are available in inheritance matters.[4] A third party can also be obliged to provide financial information of the debtor based on matrimonial law.[5] The claimant able to rely on these grounds is entitled to receive broad information, and is also not blocked by banking secrecy.

Procedural remedies

In addition to the civil remedies, a creditor may be able to obtain information on the debtor's assets based on procedural laws.

In civil proceedings, third parties are obliged to cooperate in the taking of evidence, in particular, by testimony as witness or by providing documentation.[6] Banking secrecy does not exclude per se this duty to cooperate, but renders it subject to a weighing of interests.[7] However, to prevent 'fishing expeditions'[8] the claimant must describe the requested documentation in detail. In addition, it is required that the requested information is necessary to decide the issues in dispute. While these means may thus yield additional documentation, the restrictions mentioned before weaken this possibility to collect information considerably.[9]

Various means to retrieve information exist in criminal proceedings. The public prosecutor can, for example, seize bank documents to secure evidence,[10] or request, when investigating felonies or misdemeanours, the surveillance of transactions between a suspect and a bank or bank-type institution.[11] The creditor can access the respective file if it has party rights; for example, if it has suffered harm and is a private claimant in the proceedings.[12] In cases involving criminal activities of the debtor, the creditor may thereby be able to obtain valuable information to support effective asset tracing.[13]

Information rights in debt enforcement proceedings

Information obligations of third parties exist under the Swiss Debt Enforcement and Bankruptcy Act (DEBA). These obligations apply in case of bankruptcy proceedings,[14] after the seizure of assets of a debtor[15] and, to a more limited extent, after receiving an attachment order.[16]

Seizure of the assets

After successfully finishing the preliminary stages of the debt enforcement proceedings (which may force the creditor to obtain a final and binding judgment against its debtor) the debt enforcement office will eventually seize the assets of the debtor. At this stage, the debtor and third parties holding assets of the debtor (including banks) are obliged to inform the debt enforcement office about such assets located in Switzerland.[17] The information duty also extends to assets that are only beneficially owned by the debtor and may include assets that have been transferred prior to the seizure, during what is known as the 'suspect period'.[18] To be successful, however, the information requests by the debt enforcement office must result in the debtor or the creditor providing at least an indication of where assets could be located.

Attachment orders

The duty of disclosure of the debtor and third parties applies as a matter of principle in attachment proceedings. The obligation is, however, restricted in its scope of details in relation to the attached assets, and the debt enforcement office is not entitled to inquire into further assets.[19] The creditor will thus often not gain any additional knowledge about assets, but at least obtain a confirmation of the existence, location and the value of the assets frozen by the attachment (eg, the account balance of a debtor's bank account in Switzerland).

Third parties are not obliged to disclose the requested information to the debt enforcement office immediately, but only after the debtor has either not opposed the attachment order, or after the appeals against the order have been rejected and the order has become enforceable.[20] Occasionally, this may take some time, particularly if the debtor has its domicile abroad. During this time, the creditor will have to defend and validate his or her attachment order in various procedural steps without knowing if the attachment was in fact successful and whether substantial assets have been attached.

Attachment orders

General remarks

Swiss law distinguishes between the enforcement of monetary claims through attachment orders based on the DEBA and the enforcement of non-monetary claims, such as specific performance according to the Swiss Code of Civil Procedure (CPC). In many cases, the creditor intends to obtain an attachment or freezing order for the purpose of attaching the debtor's bank accounts in Switzerland before the debtor can frustrate the enforcement of a future judgment. Because of its purpose (ie, securing the monetary claims of the creditor), an attachment order is provisional in nature and it does not provide any preferential rights over the attached assets.[21] It is also important to note that Swiss attachment orders affect the debtor's assets (in rem) and not the debtor personally.

Once the attachment order is served, the holder of the attached assets is no longer allowed to dispose of the assets, except if the debtor grants security for the creditor's claim.[22] If the assets in question are monetary claims of the defendant against a third-party debtor (eg, bank), such debtor may dispose itself of its payment obligation only by paying the relevant amount to the bankruptcy office.

The attachment order has no res judicata effect.[23] Therefore, an unsuccessful attempt to obtain an attachment order will not prevent the creditor to enforce its claim in a different attachment procedure.

This article will outline the substantive requirements to obtain an attachment order, followed by the description of the attachment procedure.

Requirements for an attachment order

A creditor seeking to obtain an attachment order must demonstrate to the competent court on a prima facie basis that: (i) it has a claim against the defendant; (ii) there is a sufficient legal ground for an attachment; and (iii) that the defendant owns attachable assets located in Switzerland.[24]

Claim of the creditor

An attachment order requires that the creditor has a monetary claim against the debtor or the right to obtain cash collateral. However, there is a (waivable) duty of a creditor to enforce encumbered assets first (beneficium excussionis realis). Hence, if the claim is secured, for example, by a mortgage or pledge, the plaintiff may be prevented from attaching additional assets.[25] Furthermore, an attachment requires that the relevant claim is due and payable.[26] Future claims do not entitle the creditor to obtain an attachment order.[27]

Attachable assets

In principle, almost all types of assets can be subject to an attachment order, including (but not limited to) bank accounts, shares and real estate, provided that those assets can be seized and liquidated. The attachment is limited to assets located in Switzerland, as Swiss law adheres to the principle of territoriality and Swiss courts do not issue worldwide freezing orders.[28]

The attachment is, in principle, limited to assets that legally belong to the debtor. This includes assets that are held by someone fronting for the debtor.[29] Attaching assets that are legally owned by a shell company is possible, but may be a challenge: piercing the corporate veil of a shell company requires that the debtor is in control of the shell company and that it shares de facto an economic identity with it. Furthermore, the use of the shell company must be deemed abusive.[30] The criteria of abusive use has been recognised in cases where the accentuation of the formal independency of the corporate body results in the circumvention of legal provisions, the non-fulfilment of contracts or the obvious infringement of a third party's legitimate interests.[31]

It is also important to note that a court will reject any application for attachment that does not sufficiently specify the assets the creditor seeks to attach as an undue 'fishing expedition'. The creditor must demonstrate on a prima facie basis that such assets actually exist.

Grounds for an attachment

The grounds for an attachment are enumerated in article 271, paragraph 1 DEBA. Accordingly, assets of the defendant can be attached if:

i the debtor lacks a fixed or permanent domicile or place of residence in Switzerland or abroad;
ii the debtor is concealing his assets, absconding or making preparations to abscond so as to evade the fulfilment of its obligations;
iii the debtor is passing through or is a person engaged in attending business fairs or markets, for claims which by their nature must be fulfilled at once;
iv the debtor has no domicile in Switzerland, and none of the other grounds for an attachment order are fulfilled, provided the claim for which the attachment is sought has a sufficient connection with Switzerland or is based on a written recognition of debt by the debtor (known as 'foreigner attachment');
v the creditor holds a certificate of shortfall against the debtor from previous bankruptcy or seizure proceedings; or
vi the claimant holds a legal title, for example, enforceable judgment, an arbitral award or official records apt to set aside the objection in debt enforcement proceedings.

The most relevant grounds for an attachment order are numbers (iv) and (vi), which will be discussed in more detail in the following.

Foreigner attachment

An attachment order in the sense of article 271, paragraph 1 (iv) DEBA requires that: (i) the defendant has no domicile in Switzerland;[32] (ii) there are no other grounds for an attachment available; and (iii) the plaintiff can either demonstrate the existence and the amount of his or her claims based on a written acknowledgment of debt that is countersigned by the defendant,[33] or that there is a sufficient connection to Switzerland.[34]

Particularly with regard to the sufficient connection criteria, Swiss doctrine has largely accepted a sufficiently close link, inter alia, under the following circumstances:

- the creditor has its domicile in Switzerland;
- the underlying agreement is subject to Swiss law;
- the claim is based on tort law and the place of the tortuous act or the place of the outcome is in Switzerland;
- the parties agreed on the jurisdiction of a Swiss arbitral tribunal; or
- the debtor conducts business in Switzerland.

The mere presence of the debtor's assets in Switzerland does not, therefore, constitute a ground for attachment.[35]

Attachment order based on enforceable title

An important ground for attachment orders is that the creditor can produce an enforceable title. As this ground was only introduced in 2011, several issues remain disputed. The Swiss Federal Supreme Court has, however, clarified that domestic and foreign judgments, as well as arbitral awards, serve to obtain an attachment order based on article 271, paragraph 1 (vi) DEBA.[36] An enforceable official record is also a sufficient title, as well as certain orders from Swiss authorities. While Swiss judgments can serve as a ground for an attachment without observing further formalities, foreign judgments must first be recognised. The following discussion thus focuses on the title provided by foreign court judgments and arbitral awards.

Lugano Convention titles

The recognition and declaration of enforceability of foreign judgments in civil or commercial matters rendered by courts of member states of the European Union, Norway and Iceland is provided for in the Lugano Convention.[37] The attachment ground of article 271, paragraph 1 (vi) serves to incorporate the protective measure requested in article 47, No. 2 Lugano Convention into Swiss law.

To serve as attachment ground, the foreign judgment must be enforceable. There is a debate as to whether a declaration of recognition and enforceability needs to be admitted in a binding form, or whether the plaintiff should be allowed to ask the competent judge to recognise the judgment as a preliminary issue in the course of the attachment proceedings.[38] While this question has not yet been decided, it appears that the Swiss Federal Supreme court tends to the view that judgments subject to the 2007 Lugano Convention require full-fledged recognition proceedings.[39] Until the Swiss Federal Supreme Court passes a clear verdict on the matter, most creditors will file for an attachment order and request recognition of a Lugano decision in parallel to exequatur proceedings.

The exequatur proceedings under the Lugano Convention are straightforward: the creditor must file the original or an authentic copy of the relevant decision and a certificate that confirms, among other things, the enforceability of this judgment in its state of origin. No legalisation or similar formalities are required. At this stage of proceedings, the court will only review whether the creditor has complied with the formal requirements of the Lugano Convention. It will not verify whether the court of origin had jurisdiction or whether there are grounds for non-recognition pursuant to article 34 of the Lugano Convention. The court is even prohibited to review the judgment as to its substance.

Swiss courts will recognise a decision rendered in a Lugano Convention treaty state if it is not final, and an appeal might be lodged, provided that such decision is enforceable in its country of origin. However, if the laws of the jurisdiction of a Lugano Convention state limit the period in which such decision can be enforced and this period has expired, Swiss courts are likely to consider this judgment as non-enforceable.

The debtor will not participate to the ex parte proceedings in this first stage. Following an attachment, the debtor may, with regard to the recognition of the claim, invoke in the appeal proceedings the denial grounds provided by the Lugano Convention – ie, that (i) the recognition and enforcement manifestly contradicts public policy in Switzerland; (ii) the debtor was not properly served; (iii) the relevant judgment is irreconcilable with another judgment given in a dispute between the same parties; or (iv) the judgment is irreconcilable with an earlier judgment between the same parties given in another state bound by the Lugano Convention or in a third state involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition.

Attachment order based on a non-Lugano Convention judgment

The recognition and declaration of enforceability of decisions made by other courts is governed by the Swiss Act on Private International Law (PILA).

The recognition of foreign judgments from states that are not bound by the Lugano Convention requires no separate proceedings. The creditor can request that the Swiss courts make the decision on the recognition of such a verdict as a preliminary issue.[40] The judge will recognise the enforceability based on a summary assessment and the prima facie facts of the case, as demonstrated by the creditor in the same manner as he or she will assess the prima facie proof for the attachment ground. The judgment must be enforceable in its jurisdiction of origin, but is not subject to a review on the merits.

A foreign decision will be recognised in Switzerland[41] if the judicial or administrative authorities of the state in which the decision was rendered had jurisdiction in accordance with the provision of the PILA, and if no ordinary appeal can be ledged against the decision or the decision is final, and there are no grounds for refusal under the PILA. According to article 27 PILA, the recognition and enforcement of a foreign judgment may be denied if (i) such recognition would be manifestly incompatible with Swiss public policy; (ii) the debtor was not duly served; (iii) the decision was rendered in violation of fundamental principles of Swiss procedural law, in particular, a violation of the debtor's right to being heard; or (iv) the lawsuit between the same parties and concerning the same cause of action had already been brought or decided.

Attachment based on an arbitral award

The enforceability of arbitral awards is governed by the New York Convention on the Recognition and Enforcement of Arbitral Awards (the NY Convention). International arbitral awards will be recognised and enforced by a Swiss judge based on a prima facie demonstration of the relevant facts, such as the enforceability of the award. The plaintiff must produce the original award or a duly certified copy thereof, and the original agreement referred to in article II of the NY Convention or a duly certified copy thereof. The arbitral award must be translated into an official language of Switzerland (German, French or Italian).[42] It remains for the debtor to demonstrate a ground for refusal of recognition and enforcement pursuant to article V of the NY Convention.

The recognition and enforceability of such international arbitral award is a preliminary question that will be decided by the court as part of the attachment proceedings. Separate recognition proceedings are not required.[43]

Attachment proceedings

Application for attachment and appeal proceedings

The creditor acting as plaintiff must file the attachment application to the local district court where the assets are located.[44] To the extent that moveable assets (eg, shares) or immoveable tangible assets are concerned, the place of jurisdiction can be identified quite easily. This can be more difficult when it comes to attaching monetary or contractual claims owed to the debtor (acting as defendant). Such claims are generally located at the Swiss domicile of the defendant or, if the defendant has no domicile in Switzerland, at the Swiss domicile of the defendant's debtor. The Swiss Federal Supreme Court requested in the later case occasionally that there is a sufficient connection to Switzerland before it confirmed jurisdiction of Swiss courts. However, in relation to bank accounts (ie, claims of the defendant against a Swiss bank), such a connection is assumed.[45] In this case, the place of jurisdiction is the bank's main seat in Switzerland, even if the customer relationship was managed by one of the bank's branch offices elsewhere in Switzerland. If a foreign branch office manages the bank account, the attachment application can still be brought at the bank's main seat in Switzerland.[46]

The court decides on the admissibility of the request for attachment on an ex parte (ie, unilateral) basis in summary proceedings. Consequently, the defendant will not be notified before the attachment order is issued. The requirements for obtaining an attachment order must be demonstrated on a prima facie basis only (ie, the plaintiff is not required to present compelling evidence on the merits of the claim).

As a consequence of the ex parte procedure to grant the attachment, the debtor's defence options are limited at this stage. If, however, the defendant expects a creditor to file an attachment application, it

might be an option to deposit a preventive protective letter with the local courts where its assets are located.[47] Such a letter typically sets out in advance the defendant's position and legal arguments against a potential request for attachment. The protective letter will only be served to the creditor if it initiates attachment proceedings and it will become ineffective six months after filing.

The plaintiff may become liable for damages incurred by the defendant (or a third party holding the defendant's assets) as a consequence of an unjustified attachment. The court has the option to instruct the plaintiff to pay a bond to secure potential damages of the defendant.[48] The use of this instrument is in the court's sole discretion.

If the attachment application is successful, the court will issue an order and notify the local debt enforcement office. The debt enforcement office will then prepare a document that specifies the assets that have been frozen and includes an estimate of their value, which will be served to the defendant, the plaintiff and, if any, to the garnishee (eg, a bank).[49] If the plaintiff fails to obtain an attachment order, the defendant will not be informed about the attempt to freeze its assets.

After the court issued an attachment order, the defendant or, as the case may be, a third party affected by the order, may file an objection with the court that issued the order, within 10 days after becoming aware of the order.[50] This gives the defendant (or the third party) the opportunity of being heard and to bring forward its arguments against the attachment order; for example, that the court had no jurisdiction or that the preconditions of the attachment order were not met. The resulting judgment can be further appealed to the respective cantonal High Court and, as a last instance, to the Federal Supreme Court.

Validation procedure and third-party rights

The attachment order will lose its effects unless the plaintiff proceeds to validate the attachment in a procedure eventually ending with the final seizure of the assets. This means that the plaintiff must instigate additional enforcement proceedings in Switzerland or start litigation to obtain an enforceable claim on the merits if it has not done so prior to filing for an attachment order. In the validation procedure the creditor must strictly observe 10-day deadlines for almost all subsequent procedural steps[51] or risk that the attachment becomes ineffective.

Third parties alleging to be entitled to the attached assets (eg, by a right of lien or as legal owner) are not limited to the objection procedure to defend their legal title. Even if they do not object to the attachment order, they can still assert their claim in a separate procedure at a later stage of the enforcement procedure.[52]

Notes

1 Schweizerische Nationalbank, Die Banken der Schweiz 2015, Zürich/Bern 2016, p. 6.
2 Article 47 Swiss Federal Law on Banks and Savings Banks.
3 See for example DFT 132 III 291.
4 DFT 132 III 677.
5 Article 170 par 2 Swiss Civil Code; article 16 Federal Act on Registered Partnerships.
6 Article 160 par 1 Swiss Code of Civil Procedure (CPC).
7 Article 166 par 2 CPC.
8 Cf. Franz Hasenböhler, in: Sutter-Somm/Hasenböhler/Leuenberger (3d ed.), Kommentar zur Schweizerischen Zivilprozessordnung, Zurich, 3d ed. 2016, Article 160 N 13.
9 The same evidence may also be made available by a request for judicial assistance in order to support a foreign proceeding, cf. DFT 142 III 116 for the application of the1970 Hague Convention of the Taking of Evidence Abroad in Civil and Commercial Matters.
10 Article 163 seqq. Criminal Procedure Code (CrimPC).
11 Article 284 seq. CrimPC.
12 Article 101 CrimPC; Article 104 CrimPC.
13 Compared to a domestic procedure the right to access the file in international criminal assistance proceedings is restricted, article 80b Mutual Assistance Act (IMAC). Whether and under which conditions a harmed party may nevertheless access the file under the IMAC remains unclear.
14 Article 222 para. 3 DEBA. This option is not further discussed in the present article.
15 Article 91 para. 4 DEBA.
16 Article 275, 91 DEBA.
17 Article 91 para. 1 and 4 DEBA.
18 Cf. DFT 129 III 239.
19 DFT 130 III 579.
20 DFT 125 III 391. The information obligation will rise even later if the attachment is based on the enforcement of an of the 2007 Lugano Convention, cf. Felix Meier-Dieterle, in: Daniel Hunkeler (ed.), Kurzkommentar DEBA, 2nd ed., Basel 2014, Article 275 N 14; DTF 131 III 660.
21 Article 281 para. 3 DEBA; an exception applies for the attachment costs.
22 Article 277 DEBA

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Prager Dreifuss Ltd. is an integrated law firm with a strong international focus, some 35 lawyers, and offices in Zurich, Berne and Brussels. Our many years of experience enable us to cut through complexity and select the right strategy for our clients. We have a lean and efficient structure, strong and diverse teams specialised in all major areas of commercial law, active ties to authorities, Swiss universities and the academia and long-standing working relationships to leading counsels in all major jurisdictions. Our lawyers have additional qualifications in their practice areas, have spent time abroad or on secondments in the industry, and undergo continuous legal training. We are committed to understand the client's business and our services are individually tailored and focused on our clients' needs. Our clients benefit from a key account system with one single point of contact, a comprehensive transaction management, efficient and responsive teams of specialists and competitive pricing and transparent billing.

23 DFT 133 III 589.
24 Article 272 DEBA.
25 Article 271 Abs. 1 DEBA; BSK DEBA II-Stoffel, article 271 N 41 et seq.
26 An exception applies in case that the defendant has no fixed domicile in Switzerland or conceals its assets.
27 Judgment Federal Tribunal 5P.87/2005
28 See article 271 para. 1 DEBA, which refers to assets "in Switzerland".
29 DFT 126 III 95.
30 DFT 102 III 165; Judgment Federal Tribunal 5P.1/2007.
31 Judgment Federal Tribunal 5P.1/2007.
32 Notwithstanding this provision being called commonly "foreigner attachment", it applies on debtors domiciled abroad, irrespective of their nationality.
33 A debate is currently led in Switzerland whether this ground can also encompass (non-enforceable) judgments, cf. High Court of the Canton of Zurich, Decision PS140239.
34 Amonn/Walther, § 51 N 16 ff.
35 DFT 106 Ia 150; Amonn/Walther, § 51 N 19.
36 DFT 139 III 135.
37 Currently the Convention of 30 October 2007 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters.
38 The distinction may lead to a res judicata effect in case that the recognition fails, thus effectively forestalling future recognition of the foreign judgment.
39 DFT 139 III 135.
40 DFT 139 III 135.
41 Article 25 seqq. PILA.
42 The court may dispense from the translation obligation.
43 DFT 139 III 135.
44 See article 272 para. 1 DEBA. Alternatively, the DEBA provides further competent courts at specific statutory places of enforcement which are, however, mostly not available in case of a non-domestic debtor.
45 BSK DEBA II-Stoffel, article 272 N 48.
46 DFT 128 III 473.
47 Article 270 CPC.
48 Article 273 Abs. 1 DEBA.
49 Article 276 DEBA
50 Article 278 CPC. If the attachment is based on a enforceable Lugano Convention judgment and subject to an explicit exequatur declaration, the debtor can also object to the exequatur judgment in separate appeal proceedings, cf. Meier-Dieterle, Fn. 20, Art. 278 N 17a.
51 Article 279 DEBA.
52 Article 106 seqq. DEBA.

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