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Notes

1 Decision No JTPI/2192/2016 of 18 February 2016 (a redacted copy of this decision will be available from the Geneva court of first instance upon request once the judgment becomes final and executory, if not challenged).
2 These laws are not yet in force. They must gain approval from the Federal Assembly before being finally adopted, and are still subject to change.
3 Issuers as well as financial service providers and their client advisers must comply with their obligations under the FinSA, regardless of their organisational structure and whether they are required to obtain an authorisation to operate.
4 By the time of the 18 February 2016 Geneva Banking Decision, the Swiss Supreme Court had already ruled, in October 2015, in two cases brought by clients prevented by their Swiss bank to close accounts by way of a cash withdrawal – although those rulings, made on evidentiary grounds, did not reach the merits of the claims. The bank argued that such a cash withdrawal would breach its risk-related internal policies and its general terms and conditions, as well as violate Swiss and foreign tax/criminal laws. The Supreme Court decided in favour of the clients on the grounds that the bank had not proven the risk analysis undertaken nor filed the internal policy relied upon with the lower courts. In addition, the Court held the bank had not demonstrated that foreign tax/criminal laws were actually applicable in this case. Decision Nos 4A_168/2015 and 4A_170/2015, both dated 28 October 2015.
5 In limited instances, Swiss procedural rules entitle a party to apply to the court to be allowed to gather evidence before initiation of legal proceedings, ie, if evidence is at risk or where the applicant has a justified interest. In addition, courts are entitled in the evaluation of evidence to take the opposing party's lack of cooperation into account when considering flaws in relevant documentation.
6 The initial FinSA draft placed the burden of proof on service providers to demonstrate fulfilment of their informational duties in the event of a dispute. It also reversed the burden of proof regarding the causal link between breach of duty and incurred damage – in case a service provider breached its informational duties, the client did not have to prove that, if duly informed, it would not have engaged in the envisaged transaction. The Swiss Federal Council's comments relating to the FinSA and FinIA drafts, p21, are available at: www.news.admin.ch/NSBSubscriber/message/attachments/41574.pdf.
7 *Ibid.*
8 *Ibid.*
9 *Ibid.*
10 *Ibid.*
11 I refer here to a collective settlement negotiated between the service provider and a large number of injured parties, who can generally opt out of the settlement within a set time limit. Moreover, the group settlement must be approved by a tribunal.
12 The initial FinSA draft gave associations and other organisations power to act in their own right against service providers in order to defend their members' rights.
13 Swiss Federal Council report dated 3 July 2013 on collective enforcement mechanisms in Switzerland, available at: www.bj.admin.ch/dam/data/bj/aktuell/news/2013/2013-07-03/ber-br-f.pdf.
14 Motion 13.3931 (Birrer-Heimo) dated 27 September 2013, available at: www.parlament.ch/en/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20133931.

Freezing assets in Switzerland: new developments

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Based on its history and owing to a relatively stable political system, substantial amounts of worldwide offshore assets are managed in Switzerland. Recent estimates put the figure at about US$2.2tn. However, these days funds may be in and out of a jurisdiction at the click of a mouse. With this in mind, Switzerland regularly reviews its approach to attachment orders and to find a balanced approach regarding the freezing of assets.

In 2011, simultaneously with the coming into force of the unified Swiss Civil Procedural Code, certain amendments came into effect in the Swiss Debt Enforcement and Bankruptcy Act (DEBA) as a result of the Lugano Convention II in 2009. The main aspect of that revision was the introduction of a new attachment ground for claims evidenced by an enforceable (foreign) judgment. A creditor who has an unsecured but matured claim against a debtor may attach the debtor's asset held in Switzerland if such creditor holds an enforceable title, such as a judgment.

Since the introduction of this new attachment ground, several legal questions that were still open at the time have been decided by the Swiss Federal Tribunal, the highest court of the country. This article will sum up the most important of these developments and shed light on some of the remaining undecided issues.

What types of decisions entitle a claimant to seek attachment?

One of the main questions that was unclear among scholars at the inception of the new law was whether Swiss courts would also accept judgments from non-Lugano Convention signatory states as reasons for attachment under the new provisions of the DEBA.[1] Since the revision had been driven primarily by the necessity to adapt the law to the new Lugano Convention, the question remained open as to whether other decisions and indeed arbitral awards would also entitle to obtain an attachment order.

In its judgment of 21 December 2012,[2] the Federal Tribunal swept away the uncertainties and stated unequivocally that any Swiss or foreign state decision shall entitle a claimant to request the attachment of a debtor's assets,[3] provided the other requirements for attachment were met (identification of assets, mature claim, no security available). The Federal Tribunal went even further and found that foreign arbitral awards also qualified as sufficient title for attachment purposes. The situation for foreign claimants with enforceable judgments in hand has thus dramatically improved as they can now simply apply for attachment without having to prove the existence of a threat to their claim.

Location of assets in case of bank funds

Based on its longstanding jurisprudence, the Federal Tribunal accepts that bank funds of a debtor with an account at a Swiss bank but with foreign residency can be attached at the place of incorporation of the bank in Switzerland. Under a purely domestic scenario (both debtor and creditor residing in Switzerland), monetary claims not materialised in a financial instrument are located at the residency of their owner/creditor. In instances where such owner does not reside in Switzerland, the location of the monetary claim is deemed to be located at the registered office of the third-party debtor; that is, the bank.[4] The Federal Tribunal argues that this is a reasonable approach to avoid situations where both the Swiss and overseas court may decline jurisdiction.

The Federal Tribunal has also confirmed its earlier jurisprudence with regard to the ability to attach bank funds at the main office of the bank in Switzerland where the client relationship arises from a branch office outside of Switzerland. In the judgment mentioned above, the Federal Tribunal held that in instances where a creditor seeks to attach funds in Switzerland against a foreign-domiciled debtor, he may do so at the main registered address of the bank in Switzerland for monetary claims stemming from the relationship with a foreign branch office of the Swiss bank.[5] This opens new options to creditors, who are aware of funds of their debtor at branch offices of Swiss banks abroad, where securing a claim may prove more difficult.

Technical aspects

In its decision of 2 July 2012,[6] the Federal Tribunal dealt with the issue of the requirement for translated decisions. A claimant in debt enforcement proceedings had based his claim on an International Chamber of Commerce award, which it had partially translated into German as the official language at the place of debt enforcement. The claimant submitted authenticated copies of the arbitration clause, the arbitration award, as well as an authenticated translation of the actual award but not of the entire reasoning. The Federal Tribunal found that most Swiss courts were fluent enough in English to understand the determinant parts of such a decision, thus making it unnecessary to translate the entire decision or award.

Although the case did not arise in attachment proceedings, it is not unlikely that an attachment judge will reach a similar view. Thus an applicant benefitting from an award held in English or any other decision framed in English may limit his supporting evidence to true copies of the substantial documents and may consider applying without obtaining full authenticated translations of the entire judgment or award. This may be especially helpful in case of urgency.

Attachment procedure

After the passing of the DEBA amendments, it was not clear whether an applicant with a foreign non-Lugano Convention state judgment would first need to apply for recognition of his decision (exequatur) before being permitted to seek attachment. In its leading case of 21 December 2012, referred to above, the Federal Tribunal held that permitting an incidental review of the recognisability by the attachment judge during the first phase of the attachment application (prima facia demonstration of requirements for attachment) was not

arbitrary.[7] Hence it is permissible for an applicant to merely request a preliminary review of the recognisability of the foreign judgment during the ex parte application proceedings for attachment. The preliminary decision of the attachment judge can then be reviewed during the full trial stage after granting the attachment (in the complaints proceedings).

This stance by the court has led other lower-instance courts to hold that an attachment application based on a Lugano Convention state judgment always requires an application for recognition. The High Court of Zurich has interpreted the Federal Tribunal jurisprudence in such a way that it denies applications for attachment if they do not include an application for recognition of the Lugano Convention state judgment.[8] Applicants are thus well advised to include a provisional application for recognition of their foreign judgment, including the necessary supporting documentation (proof of service and due process).

With regard to the identification of assets, the High Court of the Canton of Zurich has noted that here too, as with regard to the other requirements, a plausibility test applies. The applicant does not strictly need to prove the existence of assets belonging to the respondent, but it must do more than merely allege their existence. The applicant must provide objective indications that such assets are available and underline these indications with some documentation.[9] In connection with funds held at a bank, the applicant must evidence plausibly that the debtor has a banking relationship with the institution (preferably by means of providing a bank account number).

Should an application for attachment fail for whatever reason (ie, no assets are plausibly identified), the applicant can renew the application at a later stage without fear of the court dismissing his application owing to the earlier attempt (no *res iudicata* effect of previous decision). As the respondent is not informed about the failed application, there is no risk of him becoming forewarned and relocating assets in an attempt to foil the applicant's renewed attempt.

What is still uncertain?

One issue that remains contentious is the question of where an applicant needs to pursue his claim once he has been granted attachment. Under the old legislation, an applicant was only able to attach assets located in the district where it had lodged the application. Under the new attachment provisions, the applicant can request a country-wide freezing of assets throughout Switzerland at the court it approaches. The attachment court then sends out requests for judicial assistance to the other districts to enforce the attachment order.

In a recent decision, the High Court of the Canton of Zurich held that the jurisdiction to attach debtor assets is determined by the location of the assets. For tangible assets, the jurisdiction is determined by their physical location. For intangible assets such as monies held in a bank account (technically a claim of the account owner against the bank), their 'legal' location – that is, the registered office of the third-party debtor (ie, the bank) – is decisive in determining the jurisdiction of the Swiss court.[10] As a consequence, the Swiss court having jurisdiction for ordering the attachment also has authority to attach assets insofar as the debtor has its domicile abroad.

Under the old law, the applicant was forced to pursue each attachment by debt enforcement proceedings in each district where he had secured an attachment. The majority of scholars are of the view that in step with the extension to a Swiss-wide attachment regime under the new law, it should be sufficient for the applicant to undertake his prosecution steps only at the court where the attachment was granted. The jurisdiction at cantonal level is still inconsistent with regard to the question of whether several enforcement proceedings or only one (at the place where the attached assets are located) are required.[11] The Federal Tribunal has to date not had an opportunity to assess whether the legal situation has changed in this regard. For the time being, it still appears advisable for the cautious creditor to pursue the prosecution steps in all districts where assets are located.

Conclusion

In summary, Switzerland provides a balanced system to enforce monetary claims against foreign debtors. The instrument of the attachment order has been further honed and sharpened and presents a useful weapon, especially for a creditor with a judgment in hand. Importantly, it does not matter whether the judgment was issued by a foreign court (Lugano or non-Lugano jurisdiction) or by an arbitral tribunal.

Notes

1 Article 271, para 1, subsection 6 of the DEBA.
2 BGE 139 III 135 of 21 December 2012.
3 *Ibid*, consid. 5.4.1.
4 BGE 140 III 512 of 3 September 2014, consid. 3.2.
5 *Ibid*, consid. 3.5.2.
6 BGE 138 III 520 of 2 July 2012.
7 BGE 139 III 135 of 21 December 2012, consid. 4.5.2.
8 Decision PS140239 of 18 December 2014.
9 Decision PS130049 of 5 June 2013, consid. 5.
10 Decision PS150102 of 29 June 2015, consid. 4.
11 Decision of the Geneva Cour de Justice, DCSO/267/2014, 9 October 2014.

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Recent developments in the Finnish Law of Procedure: a right of appeal?

In Finland, courts are divided into two main branches: general courts hearing civil and criminal cases, and administrative courts dealing with administration actions. This article considers legal proceedings before the general courts.

District courts are the first instance of general courts, while the courts of appeal and Supreme Court function mainly as appellate courts.

The Finnish Constitution[1] provides a right to a fair trial. Pursuant to Section 21 of the Constitution, provisions concerning the guarantee of a fair trial, including the right of appeal, shall be laid down by an act. This formulation is not considered to prevent Parliament from passing legislation that provides minor exceptions to the guarantee of a fair trial, as long as the guarantees remain as the primary rule, and such exceptions do not endanger one's right to a fair trial.[2]

International treaties provide a right of appeal in criminal matters. Pursuant to Article 14 of the International Covenant on Civil and Political Rights, everyone convicted of a crime shall have the right to have their conviction and sentence reviewed by a higher tribunal according to law. Article 2 of Protocol No 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms also provides for the same right. The exercise of this right, including the grounds on which it may be exercised, shall be enshrined in law. This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law.

Under the Explanatory Report to Protocol No 7, in some states, a person wishing to appeal to a higher tribunal must in certain cases apply for leave to appeal. The right to apply to a tribunal for leave to appeal is itself to be regarded as a form of review within the meaning of Article 2.[3] When deciding whether an offence is of a minor character within the meaning of Article 2, an important criterion is the question of whether or not the offence is punishable by imprisonment.[4]

The European Court of Human Rights held that: "*The Court recalls that Contracting States enjoy in principle a wide margin of appreciation in determining how the right secured by Article 2 of Protocol No. 7 to the Convention is to be exercised. […] However, any restrictions contained in domestic legislation on that right of review must, by analogy with the right of access to a court embodied in Article 6 §1 of the Convention, pursue a legitimate aim and not infringe the very essence of that right.*"[5]

The Finnish system

Since 2011, full review of a district court's decision by a court of appeal has in certain