

## Notes

- 1 The Ruling of the Supreme Arbitrazh Court of the Russian Federation, No BAC-13688/09, dated 7 December 2009. The information about the case, as well as the texts of the discussed decisions, may be found at: <http://kad.arbitr.ru/?id=655043F7-6F6C-4AC4-95EF-FF2CE605263D>
- 2 The lease agreement was governed by Dutch law and contained a choice of court clauses giving jurisdiction to the District Court of Dordrecht, the Netherlands.
- 3 The judgment of the Arbitrazh court of Moscow Region No A41-9613/09 dated 8 June 2009.
- 4 This agreement was also referred to, for example, in the case when a judgment of the English High Court against Yukos was held to be enforceable in Russia (see: The decision of the Federal Arbitrazh Court of the Moscow District No KГ-A40/698-06-II).
- 5 The decision of the Federal Arbitrazh Court of the Moscow District No KГ-A41/6930-09 dated 29 July 2009.
- 6 Article 299 of the Russian Arbitrazh Procedural Code.
- 7 The court referred to and cited from four cases dealing with recognition and enforcement of English and Korean judgments.

## New attachment ground under Swiss law

### Introduction

The 'Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters' (Lugano I) came into effect 18 years ago, on 1 January 1992. It was tailored after the Brussels Convention of 1968, which was designed to be applicable among the member states of the European Community. The Brussels Convention was revised at the end of the last millennium and came into effect as directly applicable European law on 1 March 2002 in the form of a regulation. The revised Lugano Convention (Lugano II) was ratified by the European Union for all its Member States and came into effect on 1 January 2010 for all EU countries and Norway, eight years after its EU counterpart. Lugano II was ratified by the Swiss parliament in December 2009 and will come into effect in Switzerland on 1 January 2011.

### New legislation in Switzerland in the wake of Lugano II

Meeting the new requirements of Lugano II has required the passing of new legislation in Switzerland. Together with new Federal Civil Procedure Act ('CPA'), which will come into force on 1 January 2011, several amendments to the Federal Debt Enforcement and Bankruptcy Act ('DEBA') have been passed and these will come into force contemporaneously with the CPA and Lugano II.

This article will deal with the substantial amendments induced by Lugano II concerning the enforcement of foreign judgments in Switzerland and the consequences for the DEBA with the introduction of the new attachment ground. The revised DEBA provision aims to finally bring clarity to the long debated question as to the 'correct' safety measure when enforcing Lugano judgments in Switzerland.

### Situation under Lugano I

Article 39 Lugano I gave rise to various questions in connection with debt enforcement. According to this Article, the execution into the assets of the debtor could not go further than requesting safety measures, as long as the appeal period had not ended and no court had decided on such appeal. Article 39 paragraph 2 Lugano I meanwhile gave the claimant the right to demand safety measures when applying for the writ of execution in Switzerland ('Exequatur').

In Switzerland the question arose which safety measure ought to be granted to creditors. Opinions among courts and legal scholars were divided and ranged from freezing orders (attachment of assets) to the provisional seizure of assets and the drawing up of an inventory as provided for in the DEBA and also included cantonal safety measures contained in the 26 cantonal civil procedure codes. The Federal Tribunal has to

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date not ruled on the question (BGE 126 III 438, consid 4, p 443).

### Situation under Lugano II

Lugano II incorporates the previous rules on safety measures into its Article 47 with paragraph 1 newly providing that safety measures can be ordered even before the declaration of enforceability has been issued and before a decision on an appeal has been rendered under the condition that the foreign decision fulfils the conditions for recognition under the convention.

With regard to the safety measures available to creditors for monetary judgments, the Swiss legislator has decided that from the instruments mentioned above, only the attachment order of Article 271 DEBA would be invocable by creditors under the new dispensation. Since the other safety measures were not adjusted to Lugano II, one must gather that these are no longer available to creditors.

### Currently employed safety measures in Switzerland

Article 39 paragraph 2 Lugano I explicitly provides that an Exequatur-decision according to Article 34 Lugano I gives the creditor the right to request measures to secure his claim. Until now, several safety measures were permitted in Switzerland, but in most cases these did not fully satisfy the requirements of Article 39 Lugano I. A unified practice was never established. The court deciding on the enforceability of a judgment also had to decide which of the safety measures was appropriate for the case at hand. The advantages and disadvantages of the safety measures were the following:

The attachment according to Article 271 et seqq DEBA is the primary safety measure for any monetary claim. Its advantage is that it is granted in ex parte proceedings, giving the creditor the benefit of surprise. Also, issuing an attachment does not depend on the jurisdiction for the enforcement, which means that it is irrelevant where the debtor has his domicile.

The attachment, however, only freezes assets to the liquidation value of the claim of the creditor. It is therefore designed only for individual executions ('Einzelvollstreckung') and cannot be applied to general execution proceedings ('Gesamtvollstreckung').

Provisional seizure of assets may be requested directly from the enforcement officer, thereby bypassing the courts and the creditor does not need to specify the items he would like to have seized. This instrument, however, is only available to creditors if the debtor is domiciled in Switzerland. Also, it is not applicable to general execution proceedings. Thus, if the claim is aimed at a debtor abroad, it cannot be used as a safety measure.

The drawing up of an inventory forces the debtor to conserve the assets reflected in the register. However, it too is not applicable if the debtor has his domicile abroad.

### Current attachment grounds under Swiss law

At present, Swiss debt enforcement law provides for five attachment grounds (Article 271 section 1 no 1 – no 5 DEBA). A petitioner can request the court to order an attachment over a debtor's assets if he can credibly show to have a claim against the debtor, can identify assets which can be attached and if the debtor:

- has no permanent place of residence in Switzerland;
- is attempting to conceal assets or is planning to leave Switzerland to evade the fulfilment of his obligation;
- is on a journey through Switzerland or conducts business on trade fairs, and the claim is of a nature that requires immediate settlement;
- holds a provisional or definitive certificate of shortfall against the debtor; or
- does not live in Switzerland and no other grounds for attachment are available to the creditor. However, this requires that the claim either:
  - has a sufficient connection with Switzerland; or
  - is based on a final court judgment or recognition of debt.

If granted by the court, the petitioner then needs to uphold the attachment by proceeding against the debtor using the ordinary steps of the DEBA, ie, issuing a payment order and, if the debtor raises an objection, to have the objection set aside based on the judgment and requesting liquidation steps (bankruptcy declaration or seizure of assets) or by filing a claim against the debtor at the competent civil court.

### New statutory attachment ground as of January 2011

The coming into force of Lugano II has been utilised to settle the question of the adequate safety measure by the Swiss legislator.

Together with the introduction of Lugano II and the new CPA, the Swiss legislator has passed a partial amendment to the DEBA and added a sixth statutory attachment reason to the list of remedies available to creditors with a particular view to the rights of Lugano II creditors. Henceforth, a creditor can apply for the attachment of debtor's assets if he holds an enforceable title which would otherwise allow him to have set aside by the court an objection by the debtor raised against the debt enforcement proceedings (definitiver Rechtsöffnungstitel). As such it will be recognised in all enforceable judgments, both national and international, as well as enforceable arbitral awards.

This addition introduces a whole new aspect to attachment proceedings in Switzerland. A petitioner invoking the new attachment reason no longer needs to show that his financial interests are under threat as is the case presently with the other five attachment grounds. The mere fact that the creditor has been awarded a positive judgment on his claim is sufficient to satisfy his entitlement to obtain an attachment if he can credibly show that the judgment will be enforceable in future. The enforcement court needs only to make a prima facie check of the recognisability of the judgment.

The new law evens the playing field for creditors with a court ruling in their favour against a debtor domiciled in Switzerland. Until now, these creditors were not automatically entitled to secure their claim by requesting attachment as the current attachment reasons did not provide for such situation and creditors had to first commence debt enforcement proceedings. At the same time it makes attaching assets of a non resident creditor situated in Switzerland a lot easier, as a creditor no longer needs to prove that the claim for which attachment is sought has a sufficient connection to Switzerland.

The amendment of the DEBA will make attachment requests of creditors who hold a judgment of a Lugano Convention state court in hands even simpler. They can request attachment by simply producing two documents:

- The judgment rendered by the competent court of the Lugano Convention signatory state; and

- The requisite accompanying form as provided for in Annex V of the Lugano Convention. A provisionally enforceable judgment of a court of a Lugano state suffices to obtain attachment, even if an appeal has been lodged against it in the state of origin, as long as the appeal does not have suspensive effect. Place of residency of the debtor in Switzerland is not required. The creditor can request the attachment during ex parte proceedings, together with his request to have his Lugano judgment declared enforceable by the Swiss courts. The new provision also authorises the court dealing with an attachment request based on a Lugano Convention signatory state judgment to decide on the enforceability of the judgment in one and the same proceedings even if enforceability was not requested by the petitioner.

The court has the authority to grant an attachment for assets located in the whole of Switzerland, something which is not possible under the current dispensation where different courts had to be approached if assets were located in different court jurisdictions and cantons. This will make securing assets in Switzerland more efficient, even if the effort to coordinate such concurrent attachments by several different enforcement offices will be a demanding new task.

In principle, the petitioner is liable for damages incurred by the debtor as a result of an unjust attachment order and the court may demand that the petitioner posts security in advance to cover these damages. In the case of safety measures based on a judgment of a Lugano Convention signatory state this option will fall away as the Lugano Convention grants creditors with a judgment in hand an unconditional right to request protective measures when applying for enforceability of the judgment (Article 47 Lugano II). However, should a higher court later overturn the decision based on which a creditor sought an attachment, a liability of the creditor is likely nonetheless.

### Transitional rules

Article 63 paragraph 1 Lugano II provides, as a general rule, that the new provisions of Lugano II shall only be applicable to proceedings formally drawn up after the entry into force in the state of origin and, if the recognition and enforcement of a decision or a document are being sought abroad, if the convention has entered into force in the state where

recognition and execution are requested.

Thus, until the end of 2010 Lugano decisions will be enforced in Switzerland based on Lugano I. As of the beginning of 2011, Swiss courts will exclusively apply the Lugano II treaty. Similarly, the new attachment ground of Article 271 paragraph 1 no 6 DEBA, which also comes into force at the beginning of 2011, may only be invoked from then onwards.

### Conclusion

Waves of change in the legal field of civil procedure law are advancing towards Switzerland. The new CPA will do away with local procedural rules in civil matters, at least on paper. The revised Lugano Convention will attempt to clarify several issues that have

been contentious over the past decades.

The new attachment reason of Article 271 section 1 no 6 DEBA is likely to bring about significant changes to the Swiss debt enforcement landscape. It will do away with the uncertainties encountered to date when faced with the question of safety measures under Lugano I.

The fact that all enforceable judgments and arbitral awards shall in future entitle a debtor to attach property of a creditor without meeting any further requirements hands potential petitioners a powerful new tool in their attempts to have their outstanding debts paid. Switzerland with its tradition of being a safe-harbour for assets will undoubtedly become the target of increased attachment requests in the future, both from national and foreign creditors.

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## Switzerland ratifies the United Nations Convention on Jurisdictional Immunities of States and Their Property

**O**n 16 April 2010, Switzerland became the ninth state to ratify the United Nations Convention on Jurisdictional Immunities of States and Their Property dated 2 December 2004 (the 'Convention'). Although the Convention will not enter into force until 30 states file their instruments of ratification with the Secretary-General of the United Nations, it is already worth reflecting on how it will affect current Swiss practice on the twin issues of sovereign immunity from jurisdiction, ie, the possibility of a foreign state becoming a party to domestic court proceedings, and sovereign immunity from execution, ie, the possibility of the assets of a foreign state being subject to preliminary and/or enforcement measures ordered by a domestic court.

### The concept of state immunity

State immunity is a function of state sovereignty. States are sovereign and equal

as a matter of law and they cannot be subjected to the jurisdiction, ie, the *imperium*, of another state. Over time, however, most states have come to agree that exceptions may exist to the rule of sovereign immunity, thus departing from the concept of absolute immunity and opting for restrictive immunity. In fact, most jurisdictions now accept that, under some circumstances, sovereign immunity may be lifted. There is much less consensus, however, as to when and how such circumstances can be said to exist. The practice of national courts in this respect varies widely, depending on each jurisdiction's take on the breadth of the concept of sovereign immunity.

### The current Swiss practice on state immunity

In Switzerland, there is very little statutory legislation on state immunity. The matter is mostly governed by case law, in particular that of the Federal Supreme Court. In addition,