

## **Attachment proceedings in Switzerland: a useful step in the enforcement of foreign judgments and arbitral awards**

### I. INTRODUCTION

The main goal of a creditor who obtained a favorable court decision or arbitral award is to execute it against his or her debtor's assets. When these assets are located in Switzerland, attachment orders are an essential tool of the Swiss legal system and is often the first step of enforcement.

An attachment order is a protective measure intended to prevent the debtor from disposing of his or her assets in order to secure payment of the creditor's claim.

The purpose of the article is to describe the main aspects of the Swiss attachment proceedings especially in cases where the creditor holds an enforceable foreign judgment or arbitral award against the debtor. The discussion will show how recent developments in this field have made attachment orders more readily available for creditors.

### II. GENERAL PRINCIPLES

#### A. PRELIMINARY REMARK

Under Swiss law, initiating debt collection proceedings (and obtaining an enforceable summons to pay) is the only way to enforce a monetary claim on the debtor's assets and ultimately obtain payment. Even if the creditor holds an enforceable decision against the debtor, he or she cannot proceed directly with that title. He or she must go through the preliminary steps of debt collection.

Debt collection proceedings can be initiated at the place of the debtor's domicile or seat (Article 46 of the Swiss Debt Enforcement and Bankruptcy Act, "DEBA") or, at the place where an attachment order has been obtained (Article 52 DEBA). Accordingly, if the debtor is not domiciled or does not have a seat in Switzerland, the creditor – when relying on a foreign judgment or award – must first obtain an attachment order against his or her debtor as such attachment creates a venue for debt collection.

As a result, a creditor holding an enforceable judgment or award will, in practice, often start enforcement proceedings in Switzerland by attaching the debtor's assets.

#### B. GENERAL RULES APPLICABLE TO ATTACHMENT PROCEEDINGS

Attachment proceedings are a specific type of provisional measure enabling the creditor to freeze the assets of the debtor that are located in Switzerland<sup>1</sup>. They aim to secure enforcement of monetary claims<sup>2</sup> and are directed towards the debtor's assets as opposed to the person of the debtor (*i.e.* they operate "*in rem*" and not "*ad personam*")<sup>3</sup>.

Attachment proceedings are governed by Articles 271 to 281 DEBA. These provisions have been amended on January 1, 2011, with the entry into force of the new version of the Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and

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<sup>1</sup> Marchand, *Précis de droit des poursuites*, 2<sup>nd</sup> ed. 2013, p. 246.

<sup>2</sup> *i.e.* payment of an amount of money; as opposed to non-monetary claims (e.g. specific performance) which are governed by the Swiss Code of Civil Procedure (in particular Articles 335ff).

<sup>3</sup> Pahud, *Le séquestre et la protection provisoire des créances pécuniaires : Dans le contexte interne et international*, 2018, p.46.

commercial matters of 2007 (“Lugano Convention” or “CL”). These amendments improved the efficiency of attachment proceedings, in particular with the introduction of a new ground for attachment and the extension of the scope of powers granted to the competent courts.

To initiate attachment proceedings, the creditor must file a request for an attachment order. The proceedings are carried out *ex parte* (i.e. without hearing the opposing party) and in form of expedited summary proceedings<sup>4</sup>. The debtor will only be informed about the existence of a request for attachment once the attachment has been granted by the judge and executed by the debt collection office and only if the creditor’s application was successful. In other words, in case the request is dismissed, the debtor will never be informed of the creditor’s attempt.

According to Article 272(1) DEBA, a creditor can file for an attachment order at the court at the place where the assets to be attached are located or the court at the debtor’s ordinary venue for debt enforcement proceedings (i.e. the debtor’s permanent place of residence or seat).

Since January 1, 2011, the territorial scope of an attachment order has been broadened and the Swiss court having jurisdiction for ordering an attachment can now order the attachment of any assets located in Switzerland (including over assets located in other cantons)<sup>5</sup>. This is an important development for creditors, as under the former regime, the attachment could only be ordered in relation to assets located within the court’s local jurisdiction; a creditor willing to request the attachment of assets in various locations had to initiate separate attachment proceedings before each local court.

### III. REQUIREMENTS

Article 272 (1) DEBA provides for the requirements under which an attachment order can be obtained. The creditor must show, on a *prima facie* basis, that:

1. He or she has a matured and unsecured<sup>6</sup> claim against the debtor;
2. One of the statutory grounds for attachment is met; and
3. There are assets in Switzerland<sup>7</sup> which belong to the debtor.

A *prima facie* showing means that the creditor does not have to present conclusive evidence establishing the merits of his or her claim. The court will grant the attachment order if it appears on the basis of objective elements that the relevant facts occurred, without having to exclude the possibility that such facts may have happened differently<sup>8</sup>. An attachment order is granted on the basis of documentary evidence only, which means that the creditor must support the facts of his or her case by a document<sup>9</sup>.

The statutory grounds for attachment are set out exhaustively by Article 271 (1) DEBA, which lists the following situations:

1. The debtor has no fixed domicile;
2. The debtor is concealing his or her assets or is planning to leave Switzerland to evade the fulfilment of his or her obligations;

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<sup>4</sup> *Ibid.*, p.43.

<sup>5</sup> Article 271 (1) DEBA; Message LC, FF 2009 1504 and 1537.

<sup>6</sup> Article 271 (1) DEBA.

<sup>7</sup> Article 271 (1) DEBA.

<sup>8</sup> Decision of Swiss Federal Court 5A\_364/2008 of August 12, 2008, par. 4.2.1 and Decision of Swiss Federal Court 5P.393/2004 of April 28, 2005, par. 2.1.

<sup>9</sup> Decision of Swiss Federal Court 5A\_365/2012 of August 17,2012, par. 4.3.2.

3. The debtor is passing through or belongs to the category of persons who visit fairs and markets, for claims which by their nature must be fulfilled immediately;
4. The debtor does not live in Switzerland, and none of the other grounds for attachment is fulfilled, provided that the claim has a sufficient connection with Switzerland or is based on a recognition of debt pursuant to Article 82 (1) DEBA;
5. The creditor holds a provisional or definitive certificate of shortfall against the debtor;
6. The creditor holds a definitive title to set aside an objection in debt collection proceedings.

#### IV. ATTACHMENT BASED ON AN ENFORCEABLE JUDGMENT OR ARBITRAL AWARD

##### A. GROUND FOR ATTACHMENT

Article 272 (1) (6) DEBA, which came into effect on January 1, 2011, provides for a new ground for attachment. A creditor may request an attachment if he or she holds a definitive title to set aside an objection in debt collection proceedings, *i.e.* an enforceable judgment against the debtor.

The Swiss Federal Court confirmed that any enforceable judgment, whether domestic or foreign, enables the creditor to request an attachment order. Such is also the case for enforceable arbitral awards, regardless of the seat of the Arbitral tribunal<sup>10</sup>.

To qualify as ground of an attachment under Article 272 (1) (6) DEBA, the judgment or award must be enforceable in the country where it was issued. The prior declaration of recognition and enforceability by Swiss courts (*exequatur*) is, however, not required<sup>11</sup>.

##### 1. *Foreign judgments or awards from a non-Lugano Convention state*

If the attachment request is based on a foreign judgment or arbitral award issued in a state which is not a member of the Lugano Convention, the creditor must establish, only on a *prima facie* basis, that the decision can be recognized and enforced in Switzerland, namely that the requirements of Articles 25 and 26 of the Federal Act on Private International Law or that of Articles IV and V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“NYC”) are met. The court ordering the attachment will not make a final finding on these issues. It is only at the later stage of the validation of the attachment order that the courts will make a final determination on any objection raised against the recognition and enforceability of the foreign judgment or award<sup>12</sup>.

Swiss case law provides that in attachment proceedings, excessive formalism must be avoided when analyzing the recognition and enforceability as these issues are only examined on a *prima facie* basis. The Swiss Federal Court held, for instance, that the sole submission of a duly certified copy of the arbitral award, which reproduced the text of the arbitration agreement, was sufficient, in the framework of an attachment order, to fulfill the requirements of Article IV NYC<sup>13</sup>. The Swiss Federal Court also held that a full translation of the award was

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<sup>10</sup> Decision of the Swiss Federal Court 5A\_355/2012 of December 21, 2012.

<sup>11</sup> Stucki/Burrus, *Sentence arbitrale étrangère, séquestre et exequatur*, in 31 ASA BULL. 429, 432-433 (2013).

<sup>12</sup> Marchand, *op. cit.*, p. 250.

<sup>13</sup> According to Article IV NYC, a party seeking the recognition and enforceability of an arbitral award must file an authenticated original or a duly certified copy of the award and the arbitration agreement as well as a certified translation of these documents; Decision of the Swiss Federal Court 5A\_427/2011 of October 10, 2011.

not required in a case where the award was in English and was filed along with a partial translation of the operative part<sup>14</sup>.

## 2. *Foreign judgments from a Lugano Convention state*

The attachment proceedings are slightly different when the request is based on a judgment issued in a state to which the Lugano Convention applies. In these cases, Article 271 (3) DEBA provides that the judge should also rule on the determination of enforceability. This means that a judge granting an attachment order based on a judgment issued by a state member to the Lugano Convention will not only rule on the attachment itself, but also on the recognition and enforceability of the judgment. When filing for attachment, the creditor must, therefore, also request the recognition and enforceability of the judgment.

The recognition and enforceability under the Lugano Convention is straightforward: the creditor must merely file the original or an authentic copy of the relevant decision (Article 53 LC) and a certificate attesting its enforceability in its state of origin (Article 54 LC). At this stage of the proceedings, the court is prohibited from reviewing the judgment as to its substance. It will only analyze whether the creditor has complied with the formal requirements set forth under Articles 53 and 54 LC and will not verify whether there are grounds for non-recognition pursuant to Articles 34 and 35 LC.

The debtor, on his or her end, does not participate in this first stage of proceedings (held *ex parte*). Following the attachment order, the debtor who wants to challenge the declaration of recognition and enforceability of the foreign judgment may appeal against said declaration and bring forth the grounds for non-recognition provided for in the Lugano Convention.

## B. OTHER ASPECTS

The attachment requested by a creditor who holds an enforceable judgement or arbitral award (and is thus based on Article 272 (1)(6) DEBA) is made easier from two other perspectives.

The first one is that the creditor does not need to show further that he or she has an enforceable claim against the debtor (first requirement for attachment provided under Article 272 (1) DEBA). As the creditor's claim derives directly from the judgment or the award, the mere submission of said document is sufficient<sup>15</sup>.

The second one is that such creditor should not be required to provide a security before obtaining the attachment order. Under Article 273 (1) DEBA, the court has discretion to order the claimant to provide security for any damages that might result if the attachment order ultimately proves to be unjustified. Such security typically amounts to 10% of the claim. However, as a general rule, no security is requested when the creditor relies on an enforceable judgement or arbitral award<sup>16</sup>.

## V. PROCEDURE

Once the request for attachment is granted by the competent court, the Debt Collection Office(s) of the canton(s) where the assets are located will execute the attachment order and freeze the debtor's property to the extent specified by the creditor and authorized by the court. After the attachment is executed, the debtor will be informed of the measure and will have the right to challenge the attachment order by filing an objection. The filing of an objection gives

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<sup>14</sup> ATF 138 III 520.

<sup>15</sup> Decision of the Swiss Federal Court 5A\_806/2014 of April 28, 2015, par. 2.3.1.

<sup>16</sup> Decision of the Swiss Federal Court 5A\_165/2010 of October 10, 2010, par. 2.3.1.

the debtor the initial opportunity to be heard. The competent court has the authority to confirm, amend or reverse the attachment decision.

If the creditor, relying on a foreign decision or award, is successful in obtaining an attachment order, he or she must validate the attachment by commencing debt collection proceedings against the debtor within 10 days of service of the minutes of the execution of the attachment<sup>17</sup>. If the creditor does not commence such proceedings within the time limit, the attachment order will be lifted.

The debt collection proceedings will continue either by way of seizure of assets or by way of bankruptcy if the debtor is a company (Article 279 (3) DEBA). The attachment does not grant the creditor any preferential rights or priority over other creditors in the debt collection proceedings.

## VI. CONCLUSION

By creating a venue for debt collection in Switzerland and by preventing the debtor from squandering his or her assets, attachment proceedings are a valuable tool and generally an effective way for creditors to recover their claims.

The revision of the DEBA dated January 1, 2011 and the Swiss Federal Court's enforcement friendly decisions abolished various previously existing hurdles and created additional opportunities while offering better protections for creditors.

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<sup>17</sup> Article 279 DEBA.