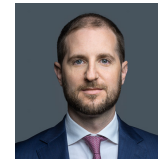


LALIVE

Swiss Supreme Court decision on competing rights to attached assets



Benoît A Mauron
Partner
Geneva

The Swiss Supreme Court has clarified the position where litigants assert competing rights to attached assets, covertly overturning its prior case law, an important development for international recovery lawyers.

This ruling (decision 5A_485/2021) by the Swiss Supreme Court concerns disputed artworks formally owned by third party A, which were attached on B's initiative to secure B's claims against C. The question is who of A or B benefits from the legal presumption of ownership and, consequently, who must file a replevin action to reverse the presumption.

Background

Under Swiss law, when a third party claims ownership over assets that were previously attached to secure a claim, it must file a replevin action in court within 20 days if the assets are in the debtor's exclusive possession (Art. 107 par. 5 of the Debt Collection Act, "DCBA"). If the third party neglects to act in a timely manner, his claims to the assets are finally dismissed so that they may be used to satisfy the creditor's claims. If, conversely, the disputed assets are not in the debtor's exclusive possession, it is up to the creditor to act (Art. 108 par. 1 DCBA) within the same 20 days period (Art. 108 par. 2 DCBA). If the creditor fails to act in a timely manner, the third party's competing claim is admitted in the attachment and ensuing debt collection proceedings, thus preventing the creditor from foreclosing on the same (Art. 108 par. 4 DCBA). This 20-day deadline may be extended if a party has its seat or resides abroad (Art. 33 par. 2 DCBA; ATF 136 III 575).

This allocation of roles may seem trivial, but it is important.

- The replevin action must be filed directly on the merits, without a prior attempt at reconciliation (Art. 198 let. e par. 3 of the Code of Civil Procedure, "CPC"). Under the Swiss procedural framework, this implies that the claimant cannot simply file a short notice of claim; it must file a fully-fledged statement of claim carefully alleging all the relevant facts and providing all available evidence or requesting targeted investigation measures. This brief is a crucial part of the litigation that, if botched, may permanently impede the prospects of a successful claim. In complex cases, preparing such a brief in 20 days is a tall order, particularly as the law requires that the evidence be translated into a Swiss official language (in Geneva, French) (Art. 129 CPC).
- Claimants need to have deep pockets since they must advance court costs at the start of the lawsuit (Art. 101 CPC) and these can be substantial (in Geneva, over CHF 200,000 for a CHF 10 million claim). Under certain circumstances (notably for claimants having their seat in offshore jurisdictions that are not parties to the 1954 Hague Convention on civil procedure or 1980 Hague Convention on international access to justice), claimants must also – if requested – provide security for the opposing party's legal costs (Art. 99 CPC). Again, these can be high (in Geneva, over CHF 100,000 for a CHF 10 million claim). Failure to pay either of these advances leads to dismissal of the replevin claim (Art. 101 par. 3 CPC).

This case

In this case, the Geneva civil court issued an ex parte attachment order over artworks held in storage rooms to secure a claim by B against C.

- Some were formally owned by A, a third party (and, incidentally, C's daughter), or by companies allegedly acting on A's behalf.
- A's objection against the attachment was dismissed on appeal by the Geneva appellate court, on the ground that the agreements whereby her mother had transferred the disputed works to her prior to the attachment were probably fabricated to shield the assets from B. The transfers were therefore deemed null and void under Art. 18 of the Swiss Code of Obligations and were thus to be overlooked for the purposes of the attachment (ACJC/582/2020 of 28 April 2020, par. 3.1.3).
- As with all decisions of this sort, the scope of this Geneva appellate court decision was limited to the attachment proceedings themselves, i.e., preliminary proceedings where the court rules on a *prima facie* basis only. It is not a decision ruling on the merits of the competing claims to the attached assets and thus is not binding on other courts that could later be called upon to examine this issue (Supreme Court decision 5A_1042/2020, 19 March 2021, par. 4).

Notwithstanding her loss before the Geneva appellate court, A then asserted ownership over the disputed artworks by notifying the debt collection office accordingly. After an exchange of views between A and B, the office directed A to file a replevin action against B within 20 days (under Art. 107 par. 5 DCBA) in consideration of the Geneva appellate court decision holding that the disputed assets were still in fact belonging to C. A challenged this decision but lost on cantonal appeal. She then appealed to the Supreme Court, which reversed the cantonal decision.

Supreme Court decision

The Supreme Court held that, when allocating roles in an upcoming replevin action, the debt collection office must give no consideration to its *prima facie* merits.

- What matters is only who effectively holds and controls the disputed assets, irrespective of possible associated legal debates.
- The office must refrain from making any determination about the legitimacy of the control.
- It must also assess the situation at the time of executing the attachment (Art. 275 DCBA) so that any subsequent court decision – such as the one setting aside A's objection – is irrelevant (Supreme Court, 5A_697/2008, 6 May 2009, par. 3.2).

The Supreme Court also stated that a recent authority to the contrary (par. 4.1 of Supreme Court decision 5A_342/2020 of 4 March 2021) was obviously an overbroad interpretation of prior case law (“Il s’agit manifestement d’une interprétation trop large des arrêts rendus précédemment dans le domaine”) and had to be discarded.

Therefore, the office ought to have disregarded the prior decision by the Geneva appellate court upholding the attachment over A's objection even if it held that the assets could remain attached to secure C's debt despite their transfer to A.

Since in this case the artworks are not clearly held exclusively by C – or for that matter by the storage company on her behalf – B must file a timely replevin action to cast aside A's competing claim. Otherwise, A's rights to the disputed assets will be finally upheld in the attachment proceedings, frustrating B's recovery attempts.

Some may wonder whether the Supreme Court allowed form to prevail over substance. In our view, it chose to prevent debt collection offices from making hasty and possibly biased judgment calls before the litigation has even started.