Switzerland

by

**André Brunschweiler, Sandrine Giroud,
and Catherine A. Kunz**

**Lalive
Geneva and Zurich, Switzerland**

**Rue de la Mairie 35
P.O. Box 6569
1211 Geneva 6
Switzerland**

**Tel +41 58 105 2000
Fax +41 58 105 2060
sgiroud@lalive.ch**

**Stampfenbachplatz 4
P.O. Box 212
8042 Zurich
Switzerland**

**Tel +41 58 105 2100
Fax +41 58 105 2160
abrunschweiler@lalive.ch**

www.lalive.ch

Switzerland

Attachment of Assets

1. What is the general nature and effect of judicial measures available for plaintiffs to obtain provisional relief affecting property of debtors to obtain security for judgments to be obtained ("attachments")? Freezing property in place? Placing it in the custody of a third party, such as a court official, sheriff or marshal?

When it comes to enforcement proceedings, Swiss law distinguishes between non-monetary (e.g., specific performance) and monetary claims (i.e., payment of an amount of money). Whilst enforcement of non-monetary claims is governed by the Swiss Code of Civil Procedure ("SCCP"), in particular Article 335 et seq., enforcement of monetary claims is regulated by the Swiss Debt Collection and Bankruptcy Act ("DCBA").

The same holds true for interim measures aiming at securing the enforcement of a judgment. Such measures can be applied for at any time during judicial proceedings on the merits or even before such proceedings have been initiated.

In practice, the most common situation is that a plaintiff wishes to secure a monetary claim by attaching the debtor's assets such as bank accounts held in Switzerland. By way of an *attachment order*, the debtor or garnishee (the third party holding the debtor's assets, such as a Swiss bank) is prohibited under threat of criminal sanctions to dispose of or transfer the blocked assets (Article 271 et seq. DCBA). Depending on the type of assets, the local Debt Collection Office ("DCO") in charge of the execution of the attachment may also request that such assets be placed in custody, which is, however, rare in practice.

The attachment order is merely an interim measure aiming at securing the later enforcement of a monetary claim but, as a rule, does *not* grant the plaintiff any preferential rights over the attached assets (for further details regarding preferential rights, see question 18). The attached assets remain the property of the debtor, who is merely restricted from disposing of the said assets or from transferring them.

Swiss courts can also order any interim measure suitable to prevent an imminent harm in support of a non-monetary claim (Article 262 SCCP). In particular, such interim relief can take the form of an injunction, an order to remedy an unlawful situation, an order to a registry or to a third party, a performance in kind, or the remittance of a sum of money (if provided by law). In practice, the registration of property rights in a public register such as the Land Register is often requested by way of interim measures. Interim measures can also be requested to prevent a party from disposing of company shares or moveable property. In cases of special urgency, and in particular where there is a risk that the enforcement of the measure will be frustrated, the court may order the interim measure immediately and without hearing the opposing party, i.e., *ex parte* (Article 265 SCCP).

This contribution focuses on attachments aiming at securing monetary claims to the exclusion of other interim measures.

2. What is the form of the attachment? Injunction? Other kind of judicial order? Specify.

The attachment made in support of a monetary claim is granted in the form of a court order. The local district court issues an attachment order and sends it to the DCO for enforcement (Article 274 DCBA) (for more details on the procedure, see question 5). Parties to the attachment order are always the plaintiff-creditor and the defendant-debtor even if the attachment order involves assets held by a garnishee (e.g., a Swiss bank). The attachment order is however also notified to the garnishee.

3. What is the jurisdictional basis for an attachment? Is the presence of the debtor's property a sufficient basis for an attachment to be obtained, assuming other requirements are satisfied? To what extent may attachments be used as a basis for obtaining personal jurisdiction over a debtor? To what extent are attachments or similar orders intended to have extraterritorial effect?

According to Article 272 DCBA, 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) shall have jurisdiction. This provision

applies to both domestic and international contexts (i.e., in respect of parties located in or outside of Switzerland).

An attachment order further allows the Swiss courts at the place where the attached assets are located to have jurisdiction over the proceedings on the merits in cases where there would otherwise be no jurisdiction in Switzerland. However, this rule is not applicable where the debtor is domiciled in an EU or EFTA state, where the 2007 Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters ("Lugano Convention") is applicable. If the dispute on the merits falls within the ambit of the Lugano Convention, jurisdiction must be established pursuant to the relevant provisions of the Lugano Convention and the mere place of an attachment is excluded as a ground for jurisdiction (Article 3(2) and 4(2) Lugano Convention and Switzerland's related declaration).

Since the revision of the DCBA, which entered into force on 1 January 2011, the territorial scope of an attachment order has been broadened and a Swiss court having jurisdiction for ordering an attachment now has the authority to attach assets throughout the entire Swiss territory. This is an important simplification for plaintiffs, since it replaces the former regime under which the attachment could only be ordered in relation to assets located within the court's local jurisdiction and thus obliged the plaintiff-creditor to make several applications. However, this only applies to the granting of the attachment's authorization and the attachment must still be validated before every jurisdiction seized for the enforcement of the attachment.[1] To avoid these difficulties and for reasons of procedural efficiency, Swiss law allows the different authorities concerned to designate among them one single authority competent for the different proceedings (Article 4a(2) DCBA).

The territoriality principle prevents attachments ordered by Swiss courts from having extraterritorial effects. In other words, only the debtor's assets located in Switzerland can be affected by a Swiss attachment order. However, the territoriality principle does not prevent Swiss courts from issuing attachment orders with regard to assets that are located at a foreign branch of a Swiss third party debtor (e.g. a Swiss bank). Indeed, the Swiss Federal Supreme Court confirmed that

[1] Decision of the Supervisory authority of the Debt Collection Office of Geneva of 9 October 2014 (case reference DCSO/267/14) published in SJ 2015 I 49.

claims against a debtor who resides abroad are located (and may be attached) at the seat of the Swiss third party debtor, even if these claims belong to its foreign branches' business operations.[2]

4. May an attachment be obtained in support of a proceeding on the merits in another country? If so, may the other proceeding be in court, arbitration or in another type of forum? Are attachments used as a mechanism in enforcing judgments or arbitral awards?

Provided the legal requirements for obtaining an attachment order can be satisfied (see question 7), a Swiss attachment may also be obtained in support of proceedings on the merits abroad, be it state court or arbitration proceedings.

Attachments are often the first step in enforcing foreign or domestic court judgments or arbitral awards. According to the new ground for attachment introduced on 1 January 2011 (Article 271(1) no. 6 DCBA), the plaintiff may ask for an attachment if he holds a definitive title to set aside an objection in debt collection proceedings (in German *definitiver Rechtsöffnungstitel*; in French *titre de mainlevée définitive*). The Swiss Federal Supreme Court has confirmed that this also includes any enforceable domestic or foreign state court judgment or arbitral award.[3]

As a result, a plaintiff holding an enforceable judgment or award will, in practice, often start enforcement proceedings in Switzerland by attaching the debtor's assets. No *separate* recognition and declaration of enforceability is needed for foreign court decisions (even for judgments falling outside the scope of the Lugano Convention[4]) or arbitral award before starting attachment proceedings in Switzerland. Rather, the judge will decide on the recognition of the foreign judgment or award in the context of the attachment proceedings (as a preliminary matter or as a separate issue).[5]

[2] Decision of the Swiss Federal Supreme Court of 3 September 2014 (case reference 5A_723/2013), making reference to and confirming its ruling in ATF 128 III 473.

[3] Decision of the Swiss Federal Supreme Court of 21 December 2012 (case reference ATF 139 III 135).

[4] Decision of the Cantonal Tribunal of Vaud of 12 April 2012 (case reference N° 115).

[5] ATF 139 III 135, c. 4.5.2; Decision of the First Istance of Zurich of 15 February 2015 (case reference: EQ150028).

5. What are the requirements for obtaining an attachment? Of property in your country? In support of a proceeding in another country, if different?

The requirements for obtaining an attachment in Switzerland in support of foreign court or arbitration proceedings are the same as those applicable in a domestic context (for more details regarding the requirements for obtaining an attachment, see question 7).

When an attachment is required without prior debt collection proceedings or proceedings on the merits being initiated, the attachment must be validated by filing of a debt collection request or proceedings on the merits within 10 days as of receipt of the minutes of the attachment (Article 279 DCBA).

6. May an attachment be obtained without notice to the debtor? If so, what are the requirements for notifying the debtor and what procedure is available to the debtor to challenge the ex parte attachment obtained? If not, what are the procedural requirements for obtaining an attachment on notice to the defendant?

Yes. Applications for an attachment are by law always dealt with on an *ex parte* basis and in the form of expedited summary proceedings. The debtor will only be informed of the existence of an attachment application against him once the attachment has been ordered. If an attachment application is dismissed, the debtor will not be notified at all about the unsuccessful attachment application.

Once the attachment is ordered, the DCO will have to notify the debtor about the attachment. If the debtor is domiciled abroad, such notification must follow the rules applicable to service abroad, through judicial legal assistance proceedings or through consular or diplomatic channels. A deadline of 10 days is set for the debtor to file a motion to discharge the attachment by filing a submission with the court that issued the attachment order (for more details regarding the challenge proceedings, see question 20). The relevant starting point for this 10-day deadline is the moment of formal service to the debtor.[6] This is

[6] Decision of the Swiss Federal Supreme Court of 9 January 2009 (case reference 135 III 232).

indeed fundamental because in practice, the debtor usually learns about the attachment from his or her bank before formal service has been carried out. This 10-day deadline may be extended upon reasoned request, in particular when the debtor has no domicile in Switzerland. Where several attachments are requested at different places, each attachment will be notified to the debtor separately. In such cases, the legal situation is not clear regarding the relevant starting point for the 10-day deadline. Some doctrines consider that the 10-day deadline shall start at the last notification of the minutes only.[7]

Besides challenging the attachment order itself, the debtor may also file a complaint against the execution of the attachment by the DCO, for instance if an attachment over the assets concerned is prohibited by law (see questions 14 and 16 hereafter).

7. What are the elements that must be established to the satisfaction of the court for it to grant an attachment? E.g., likelihood of success on the merits, likelihood that the debtor is removing, or will remove, its assets from the jurisdiction, fraudulent activity by the debtor, need for the attachment as security for an expected judgment or award?

To obtain an attachment, the plaintiff must demonstrate *prima facie* (i) the existence of a claim against the debtor which must be due and not already secured by way of a mortgage or pledge; (ii) the existence of assets of the debtor in Switzerland which can be attached, and (iii) the existence of one of the specific grounds for attachment as set out exhaustively under Article 271(1) no. 1-6 DCBA, which includes the following grounds:

1. the debtor has no fixed or permanent domicile or place of residence in Switzerland;
2. the debtor is concealing his or her assets, absconding or making preparations to abscond so as to evade the fulfilment of his or her obligations;
3. the debtor is only temporarily in Switzerland, i.e., if he or she is on transit through Switzerland or belongs to the category of

[7] STUCKI B./BURRUS L., *Les adaptations du droit du séquestre dans le cadre de la mise en œuvre de la Convention de Lugano de 2007,* SJ 2013 II, pp. 65, 89.

persons who visit fairs and markets; in such a case, only claims which, by their nature must be fulfilled at once can be attached;

4. the debtor is not domiciled in Switzerland, and no other ground for obtaining an attachment order is fulfilled, provided that the claim has a sufficient connection to Switzerland or is based on a written recognition of debt pursuant to Article 82(1) DCBA;

5. the plaintiff holds a certificate of shortfall (in German *Verlustschein*; in French: *acte de défaut de biens*) against the debtor from earlier unsuccessful debt collection proceedings; or the creditor holds a definitive title (most cases an enforceable court judgment or award) to set aside an objection in debt enforcement proceedings (see question 4).

In practice, the most common grounds for attachment are no. 4 and 6 above. As ground no. 6 is only subsidiary to the other grounds, when there is a court judgment or award available, no. 4 may, in principle, not be invoked anymore. No. 4 may, however, only be invoked if no other ground is given. As regards the ground for attachment no. 4 the difficulty is often to establish a connecting factor to Switzerland. The mere existence of assets in Switzerland is not sufficient and the link to Switzerland must be established by additional elements such as when the claim to be secured by attachment is governed by Swiss law; Swiss courts have jurisdiction over the case (on the merits); or in case of a contractual claim, the contract was negotiated or entered into force in Switzerland, or if Switzerland is the place of performance of the contract. Scholars also consider the debtor's commercial activity linked, if linked to the claim at stake, as an element to prove a sufficient link to Switzerland even when the claim is not governed by Swiss law.[8]

Whether or not there is such a sufficient link depends on the circumstances at hand, but the Swiss Federal Supreme Court specified that this requirement should be interpreted not too restrictively.

[8] Decision of the Swiss Federal Supreme Court of 9 April 2013 (case reference 5A_581/2012 consid. 5.2.2; SJ 2013 I 498).

8. What is the procedure for obtaining an attachment? What is the nature and extent of the evidence that must be presented to the Court and how must it be presented?

Courts can only order attachments upon application by the plaintiff. The plaintiff must apply to the competent enforcement court at the place where the assets against which the attachment is sought are located or at the debtor's ordinary venue for debt enforcement (see question 3). Since the organisation of the courts is regulated at cantonal level, the designation of the competent enforcement court may vary from canton to canton.

The application is usually made in writing, though in simple or urgent cases, it can also be made orally (Article 252 SCCP). In practice, however, oral applications remain exceptional. In the application, the plaintiff must indicate the debtor's name and place of domicile, the assets to be attached, the existence of a claim against the debtor (which must be expressed in Swiss francs) and the specific ground on which the attachment is sought (see question 7). If the application relates to assets held by a garnishee (i.e. typically a bank) which are formally registered in the name of a third party, but of which the debtor is the beneficial owner, the plaintiff must indicate the name of the registered owner and also demonstrate the link between the debtor's and the third party's assets (further details are provided in question 11).

In some cantons, it is normal practice for the plaintiff to complete the standard form used by the courts to issue the order for attachment and file it together with the application. It will then serve as attachment order if the court grants the application.

The plaintiff must only bring *prima facie* evidence of the relevant facts, namely (i) the existence of a claim against the debtor, (ii) the existence of a specific ground for attachment, and (iii) the existence of assets owned by the debtor that can be subject to attachment and their location (see question 7). *Prima facie* evidence of the debtor's ownership over the assets is particularly important if the assets appear to be owned by a third party (e.g., because a third party is formally registered as being the owner of the assets or the assets are held by a third party). In such a case, the plaintiff must also explicitly designate

the third party in the application[9] and give *prima facie* evidence that the owner is not the third party but the debtor.[10] For *prima facie* evidence it is sufficient that the judge considers the alleged facts and the debtor's claim to be credible even if the judge has doubts as regards their veracity.[11] The evidence available is, as a rule, limited to documents (Article 254(1) SCCP).

9. To what extent and under what circumstances, is an undertaking, in the form of a third-party bond or guarantee or a deposit, required in order to obtain an attachment? In what amount, in relation to the amount claimed, is the undertaking required? How are such undertakings generally obtained, as a matter of practice? How much do they cost?

For attachments ordered as a conservatory measure in relation to the *exequatur* (i.e. declaration of enforceability) of a foreign decision falling within the ambit of the Lugano Convention, no undertaking can be expected from the plaintiff. In all other cases, the plaintiff may be ordered to provide security in form of a bank guarantee or cash deposit to cover the likely damage that could arise from an unjustified attachment (Article 273(1) DCBA).

Courts will generally order the plaintiff to provide security if the existence of the plaintiff's claim against the debtor or the existence of a ground for attachment appears uncertain despite having been established *prima facie* by the plaintiff. Court practice shows that tribunals of the German speaking part of Switzerland (in particular Zurich) are more reluctant to order such security as compared to courts of the French speaking part. The latter, in fact, tend to apply a slightly lower threshold for the *prima facie* test whilst ordering the plaintiff to provide security for possible damages. By contrast, Zurich courts tend to apply a higher threshold for the *prima facie* test, which, once met, generally results in the issuance of an attachment order without any additional request for security.

[9] Decision of the Swiss Federal Supreme Court of 11 December 2014 (case reference 5A_615/2014).

[10] Decision of the Supervisory Authority of the Debt Collection Office of Geneva of 31 October 2013 (case reference DCSO/251/13).

[11] Decision of the Swiss Federal Supreme Court of 17 August 2012, c. 5.1 (case reference 5A_365/2012).

An undertaking can be ordered in an amount corresponding to the likely damage that could arise from an unjustified attachment based, among others, on (i) the likely length of the proceedings on the merits required to validate the attachment (validation proceedings); (ii) the likely amount of interests of loans or credits that might have to be taken out by the debtor to compensate for the unavailability of the assets during such time; and (iii) the likely court costs and legal fees relating to a possible motion to discharge the attachment and to subsequent validation proceedings. The court must examine *ex officio* whether an undertaking is required prior to granting the attachment. Such an undertaking can also be ordered upon an application filed by the debtor or a third party (namely the garnishee and/or the owner of the assets) after the enforcement of the attachment order (see question 20). Such an application can be made at any time, either in writing or orally.

The court can subsequently amend the scope of the required undertaking (or even release the plaintiff from his or her obligation to provide any such undertaking), if this is justified by new facts or a change of circumstances.

The court costs relating to such an application are regulated by a federal tariff and range between CHF 40 and CHF 2,000 depending on the amount in dispute (Article 48 Ordinance on the taxes imposed for the application of the DCBA, OELP). In addition, the unsuccessful applicant may be ordered to reimburse the legal expenses of the prevailing party, according to cantonal tariffs, which usually depend on the value in dispute. Such compensation does not necessarily cover a party's full legal costs.

10. What does the undertaking secure? Damages to the debtor if the attachment is ultimately vacated? Do such damages include interest? Other elements? Legal fees? To what extent? Court costs? To what extent?

The undertaking secures the damage to the debtor or third parties (namely the garnishee and/or the owner of the assets subject to the attachment) arising out of an unjustified attachment. Such damage includes the amount of interest of loans or credits that may have to be taken out by the debtor to compensate for the unavailability of the assets and all court costs and legal fees incurred by the debtor in relation to his motion to discharge the attachment or in relation to the

validation proceedings. The damage considered must however be actually incurred and not theoretical.

11. How specific must the application for an attachment be as to the nature, extent and location of the assets sought to be attached? How many potential garnishees may be served with an order of attachment?

The plaintiff must identify the assets to be subject to the attachment order with as much precision as possible. The plaintiff can either identify specific assets or a class of assets (e.g., all assets deposited in a given safe or with a specific financial institution). In both cases, the plaintiff must indicate their location and the name of the person or entity holding them.

With respect to assets held at a bank, the plaintiff is only required to identify the financial institution concerned and bring *prima facie* evidence of a banking relationship between the latter and the debtor. An indication of the bank account in which the assets are deposited is not required. So-called "searching attachments" or "fishing expeditions", i.e., requests for attachment not sufficiently identifying the assets to be attached but rather aiming at finding out whether the debtor has any assets in Switzerland, are not allowed under Swiss law.

The application must also mention any third parties who formally appear or are registered as being the owners of assets (e.g., the person or entity registered as account holder) over which the debtor has beneficial ownership[12] and the plaintiff must give *prima facie* evidence that the owner is not the third party but the debtor.[13]

There is no limit to the number of potential garnishees that may be served with an order of attachment. Indeed as mentioned above, a competent Swiss court may issue various attachment orders to different DCOs in Switzerland if assets are located in different locations (cantons) throughout Switzerland (see question 3). If the garnishee is a Swiss bank with various branches in different cantons, the attachment application should, as a rule, be made at the bank's main seat as

[12] Decision of the Swiss Federal Supreme Court 5A_25/2014 of 28 November 2014 and ATF 5A_615/2014 of 11 December 2014.

[13] Decision of the Supervisory authority of the Debt Collection Office of Geneva of 31 October 2013 (case reference DCSO/251/13).

registered in the Swiss Commercial Registry (as opposed to the seat of the bank's individual branch). This will not only allow the attachment to apply to all assets regardless of whether they are located at the bank's main seat or at any of its branches, but will also avoid the risk that an attachment application is made at the bank's branch which could bear the risk of being rejected if the plaintiff is not able to demonstrate a special connecting factor to that specific branch.

12. What are the obligations of a third party who is served with an order of attachment to report on the nature and extent of the assets of the debtor in his possession and the extent to which other persons, including the party served itself, have prior or competing liens on the property covered by the attachment order?

The third party who is served with an order of attachment is only under an obligation to report on the nature and extent of the assets of the debtor in his possession or on any third party's rights on such assets, including his own, once the attachment order is final. The attachment order is deemed final upon the court's final decision on the debtor's motion to discharge the attachment or, if no motion was filed by the debtor, upon the expiry of the 10-day deadline set for the submission of such motion. As mentioned above, the relevant starting point for the running of the 10 day-deadline is the moment of formal service to the debtor and not the debtor's knowledge of the attachment (see question 6).

Once the attachment is final, the third party who is served with an order of attachment must inform the DCO of the existence, value, and location of all assets referred to in the attachment order that he or she holds on behalf of the debtor. Information on assets formally belonging to another third party must only be provided to the extent that the attachment order specifies that assets belonging to such third party are subject to the attachment.

The third party who is served with an order of attachment risks criminal prosecution if he or she fails to comply with these reporting obligations (Article 324(5) of the Swiss Criminal Code).

13. To whom are such reports given? To the Court? To the attaching plaintiff? What is the form of such reports? In writing? Oral? Informal? Hints?

The attachment reports are given to the DCO. The information provided in these reports is then transcribed by the DCO in the minutes recording the enforcement of the attachment. A copy of these minutes is then immediately notified to the plaintiff, to the debtor as well as to any third party whose rights could be affected by the attachment (Article 276 DCBA).

14. What kinds of a property of a debtor may be attached? Debts of third parties to the debtor? Claims of the debtor against third parties? Expectancies?

As a rule, the debtor's moveable and immoveable assets, negotiable securities and existing claims against third parties may be attached. In respect of the attachment of immoveable assets, the rents generated by the latter are included in the attachment even if the debt is already covered by the value of the immoveable asset attached.[14]

Under Swiss law, future claims may only be attached if they can be sufficiently identified at the moment of the attachment application.[15] This requires specific and detailed information on the claim (amount, date it will be credited, origin, transferor, etc.), which is typically not available to the plaintiff. It is not sufficient to refer in the attachment application to "any (potential) future funds and/or claims". Accordingly, future claims may also be attached if they are certain and enforceable. Even future claims subject to a condition precedent may be attached if the level of uncertainty is not excessive. For example, the Swiss Federal Supreme Court confirmed that a soccer player's future claims which were conditional on his performance in a given competition (the European League, *in casu*) may be attached if the following elements are known at a time of the attachment application (i) the period in which the competition takes place, (ii) the match schedule, (iii) the allocation key

[14] Decision of the Superior Court of the Geneva Canton of 26 February 2015 (case reference DCSO/103/2015).

[15] Decision of the Swiss Federal Supreme Court of 4 November 2013 (case reference 5A_328/2013).

of future income, and (iv) the maximum amount that participating soccer players may earn.[16] By contrast, mere expectancies cannot be attached.

Some assets of the debtor cannot be seized by law and can therefore not be attached (see question 16).

15. What is the effect of the service of an order of attachment on assets of the debtor that came into the possession of the garnishee after the time of the service of the attachment order? Are there any time limits on the effectiveness of the order of attachment? In particular, what is the effect of the service of the order of attachment on a bank that has issued or confirmed a letter of credit of which the debtor is a beneficiary?

As a rule, the attachment only applies to assets that are in the debtor's possession at the time of execution of the attachment (i.e., served on the debtor or the garnishee). For instance, the attachment does not apply to funds that are credited on a bank account just after the service of the attachment order. In other words, the attachment can be compared to a "snapshot" rather than a "film".

With respect to assets deposited in bank accounts, the object of the attachment is technically a claim of the debtor against the bank regarding the restitution of the said (intangible) assets. Accordingly, assets that came into possession of the garnishee after the issuance of the attachment order will not be attached, unless they have been identified by the creditor in the attachment application and the requirements for attaching future claims are met (see question 14).

For letters of credit of which the debtor is beneficiary, the object of the attachment is the debtor's claim against the bank for payment of the sum guaranteed by the letter of credit. Thus, the bank served with the attachment order may not dispose of the claim and will no longer be able to pay out the amount stipulated in the letter of credit to the debtor once it has been served with the attachment order.

In practice, if the assets deposited in the debtor's bank account are subject to attachment, banks will usually avail themselves of preferential rights thereon, as agreed upon in the banking contractual

[16] Decision of the Swiss Federal Supreme Court of 4 November 2013 (case reference 5A_328/2013).

documentation, in relation to any claim the bank may have against the debtor. As a result, if a bank has an obligation to pay under a letter of credit, it will usually exercise its preferential rights and the creditor will only be able to attach the balance remaining after such preferential rights have been exercised.

As regards temporal limits, the attachment lapses if the creditor (i) fails to comply with the deadlines set for validation of the attachment; (ii) withdraws the action on the merits or the debt enforcement application or allows them to elapse; (iii) is unsuccessful in the proceedings on the merits (Article 280 DCBA); or if (iv) in case the debtor is a legal entity (as opposed to an individual), bankruptcy proceedings are opened against such debtor, in which case the attached assets will become part of the bankruptcy estate and the plaintiff will have no privilege over other creditors. In all other cases, the attachment remains in effect.

16. Are there certain kinds of assets or property of a debtor that are immune, or in some other way protected from attachment, e.g., pension funds, salaries, wages, diplomatic property, other sovereign property, other property specified under consumer-protection laws?

Assets which cannot be subject to seizure cannot be attached. Such assets are in particular indispensable items which include (i) objects for the debtor's personal use; (ii) religious books and items of worship; (iii) tools and other objects indispensable to the debtor for exercising its profession; (iv) specific animals indispensable to nourish the debtor and family or to maintain the debtor's business; (v) the food and fuel required by the debtor for two months subsequent to the seizure or the money or credit necessary to purchase the same; (vi) the uniform equipment and arms, the military horse and the pay of a member of the army or civil defence and the community service equipment and pay; (vii) specific annuities; (viii) amounts received from charitable institutions in the event of illness, need, invalidity or bereavement; (ix) annuities, capital payments and other forms of compensation to victims or kin for bodily harm, damage to health or bereavement to the extent that such benefits constitute satisfaction, replacement of recovery costs or serve for the acquisition of aids; and (x) specific pension annuities or unmatured claims for benefits of pension funds (Article 92 DCBA). Provisions regarding unseizability contained in the

Federal Act on the Insurance Contract, the Federal Act on Author's Rights, and the Swiss Criminal Code are reserved.

Moreover, incomes are subject to a limited seizability up to the amount the DCO deems indispensable for the debtor and his or her family. Such income can be seized at most for one year as of the seizure (Article 93 DCBA).

The only particular feature of immunity in the context of debt enforcement proceedings consists of the fact that assets linked to the acts of a state in the exercise of its functions as a public authority, i.e., acts *de iure imperii*, benefit from immunity, whilst assets that are linked to the private or commercial activities of a state, i.e., acts made *de iure gestionis*, do not, provided that the transaction out of which the claim against the foreign state arises has a connection to Switzerland (in German: *Binnenbeziehung*; in French *rattachement suffisant*).[17] Moreover, debt collection proceedings are excluded in relation to assets belonging to a foreign state or a central bank assigned to tasks which are part of their duty as public authorities (Article 92(1) DCBA).

17. For how long may an order of attachment remain in effect? If the attachment order is in support of a proceeding in another forum, are there any requirements concerning when, in relation to the date of the issuance of the order of attachment, the proceeding in the other forum must be commenced? Completed?

As mentioned above (see question 15), the attachment lapses if the plaintiff (i) fails to initiate proceedings to validate the attachment within the applicable time limits; (ii) withdraws the proceedings on the merits or the debt enforcement application or allows them to elapse; (iii) is unsuccessful in the proceedings on the merits (Article 280 DCBA); or if (iv) in case the debtor is a legal entity (as opposed to an individual), bankruptcy proceedings are opened against such debtor, in which case the attached assets will become part of the bankruptcy estate and the plaintiff will have no privilege over other creditors. In all other cases, the attachment remains in effect.

If the attachment order is issued in support of foreign proceedings, the proceedings on the merits in the foreign forum must comply with the

[17] ATF 106 Ia 142, c. 3b and 4; ATF 135 III 608.

ordinary time limits provided by the DCBA. In particular, the plaintiff who has not already applied for debt enforcement proceedings in Switzerland or brought an action on the merits before the appropriate forum, be it in Switzerland or abroad, prior to apply for the attachment order, must do so within 10 days of the notification of the minutes of the execution of the attachment (Article 279 DCBA). This deadline may be extended upon reasoned request, in particular when the debtor has no domicile in Switzerland. There is no specific debt enforcement deadline within which the proceedings on the merits must be completed. The deadlines concerning the underlying claim are reserved.

18. What rights in the plaintiff are created by the service of an order of attachment? Priority over creditors attaching later? Do banks and other garnishees have set-off or other priority rights superior to those of creditors attaching assets of debtors who are also debtors of such garnishees?

The attachment order guarantees the plaintiff that the debtor's assets will remain attached, pending the proceedings on the merits. An attachment does not, however, grant the plaintiff priority over other creditors in subsequent enforcement proceedings. If the assets attached are seized in favour of a third party before the plaintiff who was granted the attachment order is in a position to file an application for seizure, the plaintiff is merely entitled to participate in such seizure of assets as initiated by a third party (Articles 281 and 112 DCBA; for more on priority between creditors see question 19).

An attachment does not, in principle, prevent banks and other garnishees from setting off their claims against the attached assets provided that such set-off claims validly exist at the time of attachment. This depends, however, on the particular circumstances of the case and a garnishee might first need to have its claim confirmed (Article 106 et seq DCBA) prior to setting it off against the attached assets. In practice, banks often benefit from a preferable situation than ordinary debtors due to the fact that they generally obtain from their clients and possible debtors a bill of exchange or other rights *in rem* in their favour. Also, the banks' general terms and conditions usually provide for a pledge or other preferential rights in favour of the banks over the client's assets deposited with the latter. As a result, banks may often proceed by way of facilitated debt collection proceedings (Articles 177 et seq. DCBA).

19. How are attachments ultimately enforced as judgments? What is the procedure? What happens if multiple plaintiffs seek judgments against the same property at roughly the same time?

If the debtor has not filed a motion to dismiss the attachment or if the attachment was confirmed as a result of the courts' dismissal of such a motion, the plaintiff may apply for the continuation of the debt collection proceedings which can proceed either by way of (i) seizure of assets or (ii) by way of bankruptcy if the debtor is registered with the Commercial Register in one of the capacities set out in Article 39 DCBA (Article 279 DCBA).

In case the debtor is subject to seizure of assets, the DCO must immediately proceed to the seizure upon receipt of the application for the continuation of the debt collection proceedings or have such seizure executed by the DCO at the place where the assets to be seized are located (Article 89 DCBA). For each seizure, a deed is drawn up and signed by the executing officer. If there are no seizable assets, the deed of seizure serves as a certificate of shortfall (Article 115 DCBA). Otherwise, each member of a group of creditors is entitled to request the realisation of the assets, which proceeds as a rule by way of public auction (Article 125 et seq. DCBA) or, exceptionally, by way of private auction, assignment of claims, or special realisation proceedings. Creditors filing an application for continuation within 30 days of a seizure participate in the seizure, which is extended as necessary in order to cover the claims of all the creditors of the group. Creditors who file the application for continuation after the 30-day deadline constitute similar groups resulting in additional seizures. Assets already seized can be seized again only to the extent that their proceeds will not be required for distribution to the creditors for whom the preceding distribution was made (Article 110 DCBA). Specific persons may participate in a seizure within 40 days thereof without first initiating debt collection proceedings, such as, under certain conditions, the debtor's spouse or the debtor's children for claims from the parental relationship or the guardianship (Article 111 DCBA).

By contrast, if the debtor is subject to ordinary bankruptcy proceedings, the attachment is lifted and all assets of the debtor will become part of the bankruptcy estate. With the opening of bankruptcy proceedings, the debtor loses his or her authority to dispose of the assets. The assets are realised by a receiver and the proceeds are

distributed proportionally amongst the creditors. The creditors' claims are assessed and, if approved by the receiver, divided into different classes, depending on their nature. Priority is given to creditors with secured claims. These claims are satisfied out of the proceeds of the realisation of the respective collaterals. Creditors with unsecured claims follow this class order: (i) first class claims: in particular, claims resulting from employment relationships; (ii) second class claims: claims by social security, health, unemployment, insurance institutions and the like; and (iii) third class claims: all other claims accrued prior to the opening of bankruptcy proceedings. Creditors of an inferior class only participate in the distribution of the proceeds once creditors of a superior class have been satisfied. If the proceeds are not sufficient to satisfy all creditors in one class, the available amount will be equally distributed among them in proportion to the amount of their respective claims as a so-called dividend payment.

20. What is the procedure for challenging or vacating an order of attachment?

Any person whose rights are affected by an attachment order may file an objection with the judge who issued the order within 10 days of learning thereof (Article 278 DCBA, see question 6). In addition, an appeal (in German: *Beschwerde*; in French *recours*) may be filed against the decision on the objection within 10 days (Article 319 in relation to Article 309 SCCP). It is noteworthy that during the objection or appeal proceedings, the attachment remains in full force and deploys its effects. Finally, a last appeal may be filed before the Swiss Federal Supreme Court within 30 days as of receipt of the judgment on appeal (Article 72 Swiss Federal Supreme Court Act).

Provided that the debtor provides adequate security, he or she may be authorised to dispose of the attached assets (Article 277 DCBA).

21. If there are any other aspects of attachment of law that have not been addressed in the questions, please discuss them here, or elsewhere, as appropriate.

A party fearing that *ex parte* interim measures, such as an attachment order or any other measure, might be ordered against him or her without prior hearing, may file a so-called protective brief, by which he or she may set out his arguments against a potential

application for an attachment or an interim measure in advance (Article 270 et seq. SCCP). The court will only serve the brief on the counterparty if the latter files an application for an attachment or an *ex parte* injunction. The protective brief remains in effect for six months after being filed, after which it may be renewed by a request for extension. Protective briefs are, however, not permitted in enforcement proceedings under the Lugano Convention, given that a court presented with a request for enforcement of another court decision rendered in one of the member states to the Convention has to declare such a decision immediately enforceable, upon the satisfaction of the formal conditions set out in the Lugano Convention without hearing the debtor. Having the latter not being heard, he or shemay object to such a declaration of enforceability only at a later stage (Article 41 Lugano Convention).

Terminology

It is recognized that the word "attachments" used for the subject of these questions—and of the book that will result—may be referred to by many other terms. Such words include garnishments, embargoes, seizures, arrests—as well as a variety of other terms in languages other than English. The term "attachment" has been used as a generic term for all of these and other kinds of judicial orders that have the effect of immobilizing property of a debtor in connection with civil proceedings for expected or already awarded damages. These may be orders removing property from the possession of a defendant or his or her debtor or injunctions preventing the debtor from removing his or her property from the jurisdiction. Thus, "attachment orders," as used herein, may refer to injunctions as well.

As can be seen, the term "plaintiff" has been used for the party with a claim who applies for an attachment order and "debtor" has been used for the person against whom the plaintiff has the claim and whose property the plaintiff seeks to attach. "Garnishee" has been used for the person—be it a bank or other obligor to the debtor—who holds the property which is subject to the order of attachment.