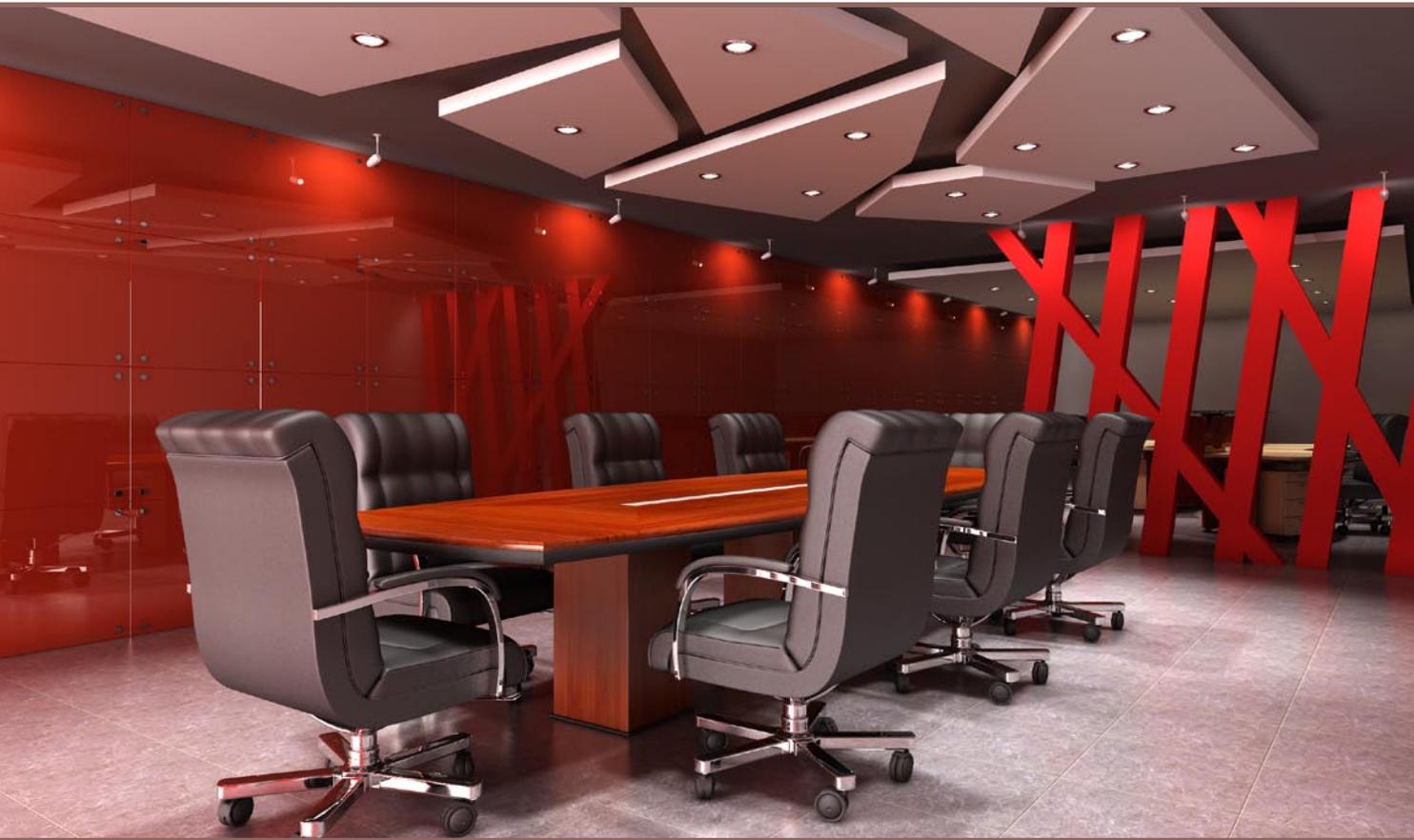


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the possibility to directly opt for the application of Chapter 12 of the PIL Act and, conversely, parties to a dispute subject to international arbitration and thus in principle governed by Chapter 12 of the PIL Act can opt for the application of the SCCP and the rules governing domestic arbitration.

Conclusion

The unification of civil procedure in Switzerland, which was first envisaged in 1872 by the Swiss legislator, is finally about to become reality. The SCCP will remove today's barriers which hinder the Swiss legal market in civil matters. Swiss lawyers will be able to provide their services in civil proceedings throughout Switzerland without facing procedural and legal obstacles. In turn, clients will largely benefit from the simplification and increased expediency of the new civil procedure. This historical development will help Switzerland enter the twenty-first century with the necessary tools to make it a competitive forum for litigation.

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Freezing of Assets Held by Foreign Parties in Swiss Banks

BY WERNER JAHNEL | LALIVE

Switzerland is without a doubt among the world's leading banking nations, holding a significant volume of foreign assets in its banks and financial institutions. The freezing of those assets by a creditor might become necessary in order to secure its monetary claims, either through the enforcement of a foreign judgment or arbitral award or by way of a freezing injunction granted as a provisional measure in ongoing court proceedings abroad or in contemplation of proceedings in Switzerland. In the majority of the Swiss cantons, the available measure for securing monetary claims is a freezing order (*séquestre*) obtained under the Federal Debt Enforcement and Bankruptcy Act 1889 ("DEB Act").

Conditions for Obtaining a Freezing Order from the Swiss Courts

The application for a freezing order against monies held in a bank account must be filed before the court at the place where the assets are located. Such place is deemed to be that of the bank's headquarters or that of the bank's subsidiary if the bank's headquarters are not located in Switzerland.

The freezing order will be granted if the creditor demonstrates *prima facie* that: (i) the creditor has a claim; (ii) there exists a ground for a freezing order under the DEB Act; and (iii) there are assets in Switzerland belonging to the debtor.

Regarding the existence of a claim and the grounds for a freezing order, the elements to be proven by the creditor will vary.

If the application is based on a judgment rendered in a Contracting State to the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (the Lugano Convention) or on

an arbitral award pursuant to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, all that is required is the filing of the original or certified copy of the judgment or award (and arbitration agreement), together with duly certified translations as the case may be.

However, if the judgment is rendered in a State not party to the Lugano Convention, the creditor has to meet the strict requirements for recognition and enforcement provided under the Swiss Private International Law Act (PIL Act), i.e., (i) the foreign court had jurisdiction; (ii) the decision is final and no ordinary appeal can be lodged; and (iii) its recognition would not be incompatible with Swiss public policy.

If the application is based on an interim measure such as a worldwide freezing injunction rendered by a court in a Contracting State to the Lugano Convention, the creditor must show that the injunction is enforceable in the country of origin; was rendered in *inter partes* proceedings; is not contrary to Swiss public policy; and sufficiently specifies the location of the assets frozen (no “fishing expedition” is allowed). However, if the injunction was rendered in a State which is not party to the Lugano Convention, the application will most probably not be granted; the prevailing view in Switzerland is that recognition of interim measures (including such injunctions) outside the Lugano Convention States is generally excluded. In this case, the creditor could still obtain a Swiss freezing order under the requirements set out below.

Where the application is not based on a judgment or an arbitral award or foreign freezing injunction, the purported creditor can indeed seize assets of debtors not domiciled in Switzerland if it can be shown that: (i) the alleged debt is due and that the alleged debt is not secured *in rem*; and (ii) the claim is based on a recognition of debt or the claim has a sufficient connection with Switzerland, e.g., the debtor’s obligation was or is to be performed in Switzerland; the Swiss courts have jurisdiction on the merits; Swiss law is the applicable law to the merits; the litigious contract was concluded in Switzerland in the presence of the parties; however it is not a sufficient connection if the creditor or the debtor is a Swiss national or that the assets to be frozen are located in Switzerland.

In all the above cases, the creditor must demonstrate that the debtor has no domicile in Switzerland, or has no fixed domicile, or is concealing its assets, absconding or preparing to abscond so as to evade its obligations.

In addition, the creditor must also have sufficient evidence that the debtor has assets located within the jurisdiction of the court where the application is filed. The approach varies from one cantonal court to the next, but generally speaking, the more information the creditor has, the more likely is the granting of the freezing order. Swiss courts currently apply a stricter approach to this requirement than in the past, thereby disallowing any form of fishing expeditions.

The Procedure for Obtaining a Freezing Order

A freezing order is issued in *ex parte* expedited summary proceedings which usually last only a few days or even a few hours if urgency is established by the creditor. The court fees are modest, currently CHF 1,000 to CHF 2,000.

If the court grants the application, it issues a freezing order which is notified to the Debt Collection Office of the place where the assets are located. The Debt Collection Office notifies the creditor and the relevant bank or financial institution, but not the debtor so as to avoid any risk of removal of the assets. It is the bank which then informs the debtor. Meanwhile, the bank is obviously prohibited from disposing of the assets, and will be liable for damages if it does, which operates as a very effective deterrent.

Upon execution of the freezing order, the Debt Collection Office issues a freezing certificate to the creditor which lists the assets attached and provides an estimate of their value.

Following receipt of the freezing certificate, the creditor must pursue the claim within 10 days, generally by requesting a summons to pay from the Debt Collection Office. If the application is not based on a court judgment or an arbitral award, the freezing order will have to be validated by the creditor filing a law suit on the merits of the claim, either before the court which has jurisdiction to hear the claim on the merits, or before the court which granted the freezing order.

On the other hand, following notification of the freezing order, the debtor and the bank have ten days to appeal against the order to the court that granted it. The judge will then initiate *inter partes* summary (i.e., also expedited) proceedings and will examine the likelihood of the existence of the debt.

Proposed Amendment to the Federal Law

The Swiss legislator recently took the opportunity of the revision of the Lugano Convention (which will be implemented in Switzerland at the same time as the new Unified Swiss Code of Civil Procedure due to come into force in 2011) to propose the amendment of certain provisions of the DEB Act dealing with freezing orders. These amendments are subject to a possible request for referendum by the Swiss population until 1 April 2010 and will most probably not enter into force before 2011.

Three key changes are worth noting. First, all the Swiss courts will have to uniformly apply criteria set out in the DEB Act for the granting of freezing orders and temporary attachments will not be available. Secondly, if the debtor is domiciled in Switzerland obtaining a freezing order will be possible on the basis of a foreign or a Swiss court judgment without any further requirements. Thirdly, the court from which the freezing order is sought will have jurisdiction to grant an order regarding assets located within its own canton and within the whole of Switzerland.

Conclusion

To sum up, a creditor who seeks to freeze assets held by a foreign debtor in Swiss banks must simply produce an enforceable judgment or a claim with a sufficient connection with Switzerland as well as detailed evidence regarding the assets to be frozen. Once these conditions are fulfilled, Swiss courts are very efficient in granting freezing orders.

However, the proposed amendments to the relevant law would be a welcomed improvement for creditors seeking to pursue a foreign debtor as they will address difficulties resulting mainly from the shared jurisdiction of different courts as well as their non uniform practice.

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