

Freezing a Defendant's Assets: Enforcement of a Worldwide Freezing Injunction in Switzerland

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A powerful weapon in English court proceedings is the worldwide freezing injunction, preventing a defendant from disposing of assets pending the resolution of the underlying substantive proceedings. However, the weapon is only as effective as the claimant's ability to wield it. In particular, the claimant must be able to enforce the injunction in the jurisdiction where the defendant's assets are located.

In Switzerland, the enforcement of worldwide freezing injunctions is generally possible, provided that the proper procedure is followed and the relevant conditions are met.²

Procedure

The enforcement of an English freezing injunction in Switzerland is governed by the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (the "Lugano Convention"), to which both Switzerland and England are party. Under Article 26 of the Lugano Convention, a judgment given in a Contracting State shall be recognised in the other Contracting States. Like all judgments enforced under the Convention, provisional measures such as freezing orders may not be reviewed as to substance.

An application for the recognition and enforcement of a worldwide freezing order against a bank account can be made either in the canton where the bank account is held or in the canton of the headquarters of the bank. Unlike a Swiss attachment order, enforcement of the worldwide freezing order in Switzerland under the Lugano Convention does not need to be supported by a guarantee as a Swiss court would assume that the cross-undertaking in damages has been obtained by the issuing court.

Once the application is filed in the relevant court, a decision is normally issued within a few days. The efficiency of the Swiss courts in this regard is a valuable advantage in securing the enforcement of a worldwide freezing order against a defendant's assets in Switzerland.

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² Swiss Federal Tribunal ATF 129 III 626 ; Donzallaz, *La Convention de Lugano*, Berne 1997, N° 2450.

Conditions

In order to enforce the freezing injunction in Switzerland, the following conditions must be met:

- *The injunction is enforceable in the U.K.*³

The claimant must show that the freezing injunction is enforceable in England. Normally, the freezing injunction itself contains a declaration by the English court that it is immediately enforceable. Such a declaration has been accepted by the Swiss courts to satisfy this condition.

- *The injunction was rendered inter partes in the U.K.*⁴

The respondent must have had the opportunity to be heard. This means that a freezing injunction cannot be recognized until after the *inter-partes* hearing confirming the freezing injunction. The claimant has to prove that the respondent defended itself at the *inter-partes* hearing or that the respondent has been duly notified of the hearing and the *ex parte* freezing injunction. The ensuing *inter-partes* injunction must also have been validly served on the respondent.

- *Injunction is not contrary to Swiss public policy*⁵
- *“Real connecting link between the subject-matter of the measures sought and the territorial jurisdiction of the Contracting State of the court before which those measures are sought”*⁶

This requirement applies to the recognition of freezing injunctions in Switzerland under the Lugano Convention, only if the respondent is resident in a Lugano Convention member state. The “real connecting link” can be either substantial property of the respondent in England or (virtual) jurisdiction of the English court for the dispute on the merits according to the Lugano Convention.

- *Prima facie evidence of assets in Switzerland*

Swiss courts recognize a freezing injunction if the claimant can show prima facie evidence of assets within the jurisdiction of the court.

The courts of different cantons vary in their approach to this requirement. If different cantonal courts have jurisdiction to hear the application, for example because the defendant has assets in different parts of Switzerland, this could therefore be one

³ Article 47(1), Lugano Convention.

⁴ Tunik, *L'exécution en Suisse des mesures provisionnelles étrangères ; un état des lieux de la pratique*, in *Semaine Judiciaire* 2005 II, pp. 298-300.

⁵ Article 27(1), Lugano Convention.

⁶ ECJ, decision in *Van Uden* of 17 November 1998, C-391/95.

strategic consideration to bear in mind, when deciding with which court to file the application.

- *Either the original or a notarized copy of the injunction is provided to the Swiss court⁷*
- *Injunction provides the full names and addresses of the parties*

Effect of recognition and enforcement

Once the English freezing injunction has been recognized and declared enforceable in Switzerland, it becomes effective as if it were a judgment by a Swiss court. A Swiss third party holding assets of the defendant (usually a bank or financial institution), which has been notified of the worldwide freezing injunction and its declaration of enforceability, is prohibited from disposing of the assets. Disposal of the assets would carry the risk of personal liability for the sums in question, which operates as a very effective deterrent.

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The Swiss courts' enforcement-friendly attitude means that the enforcement in Switzerland of a worldwide freezing injunction is a very powerful and effective strategic weapon for a claimant in English court proceedings.

⁷ Article 46, Lugano Convention.