Switzerland

by

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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 claims (*e.g.*, performance in kind) and monetary claims (i.e., payment of an amount of money or creation of a security interest). 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 dichotomy applies to interim measures sought to secure the enforcement of a claim – be it adjudicated by judgment or not – depending on whether it is monetary or non-monetary. 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 where 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 attached assets (Article 271 et seq. DCBA). Depending on the nature of the considered assets, the local Debt Collection Office ("DCO") in charge of the execution of the attachment may also request that such assets be placed in its custody, which is, however, rare in practice.

An 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* the answer to question 18). The attached assets remain the property of the debtor, who is merely prohibited from disposing of the said assets or from transferring them, as are garnishees notified of an attachment order.

Swiss courts can also order any interim measure suitable to prevent an imminent harm in support of a non-monetary claim (Article 262 SCCP). They may in particular issue injunctions, orders to remedy an unlawful situation, orders compelling anticipated performance in kind (in exceptional circumstances) or the remittance of a sum of money (if provided by law). Said orders may also be addressed to a public registry or a third party. In practice, the registration of property rights in a public register such as the Land Register or injunctions from amending the Register of Companies are 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 otherwise be frustrated, the court may order the interim measure without prior hearing of the opposing party, i.e., *ex parte* (Article 265 SCCP).

This contribution shall thereafter focus 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 issued by a district court and sent to the DCO for enforcement (Article 274 DCBA) (for more details on the procedure, *see* the answer to question 5). If assets are spread out across Switzerland, the court notifies all competent DCOs under which jurisdiction the targeted assets are located.

Attachment orders usually take the form of summary documents devoid of reasoning. They merely identify the creditor and the debtor(s), set the amount of the claim(s) (as applicable with interests), reference the legal provision(s) providing the ground for attachment and list the asset(s) to be attached. Only if (or to the extent) an application is not granted does the court issue a reasoned decision setting out the justification for the court's rejection.

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 Swiss court at the place where the assets to be attached are located or the Swiss court at the debtor's ordinary venue for debt enforcement proceedings (i.e., the debtor's domicile or seat in Switzerland) shall have jurisdiction. This provision applies to both domestic and international contexts (i.e., in respect of parties located in or outside of Switzerland).

Tangible (movable and immovable) assets are located where they are physically situated. Intangible assets (claims and other rights) are deemed located (i) at the domicile or seat of the debtor if the same is in Switzerland[1] or (ii) at the domicile or seat of the garnishee (i.e. the debtor's debtor) if the debtor has his domicile or its seat abroad.[2]

In an international context, a jurisdictional ground for the issuance of an attachment order grants fallback jurisdiction to the local Swiss court over the potentially ensuing proceedings on the merits where the Swiss Private International Law Act would otherwise not provide for a Swiss forum. However, this rule does not apply where the debtor is domiciled in an EU or EFTA state, where the Convention of 30 October 2007 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 a prior Swiss attachment is excluded as a ground for jurisdiction on the merits (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 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

[1] Decision of the Swiss Federal Supreme Court of 3 September 2014 (case reference 140 III 512 consid. 3.2).

[2] Decision of the Swiss Federal Supreme Court of 14 December 1981 (case reference 107 III 147 consid. 4.a).

obliged the plaintiff-creditor to make several applications. The majority of Swiss legal scholars opine that for coordination purposes, it should also be possible for the court granting the attachment to designate one single DCO in charge of executing the attachment throughout Switzerland by requesting assistance from other local DCOs (so called "Lead DCO"). However, this concept of "Lead DCO" is not yet very well established and recognized throughout Switzerland. The Geneva DCO, for instance, has to date systematically refused to take part in such coordination and hence refused to execute attachment orders not directly notified to it by the issuing court. Geneva courts have furthermore confirmed that a plaintiff obtaining an attachment order over assets located in various Swiss local jurisdictions must validate the same in each of said local jurisdictions. The attachment would otherwise be automatically lifted in every jurisdiction where he would fail to act.[3] This practice of the Geneva Court is, however, contrary to the practice of many other Cantons and DCOs in Switzerland, which consider it sufficient if the attachment is validated in one place only, typically where the Lead DCO is located. The Swiss Supreme Court has not ruled on this question to date.[4]

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 apprehended 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 garnishee (*e.g.*, a Swiss bank). Indeed, the Swiss Federal Supreme Court confirmed that claims against a debtor who resides abroad are located (and may be attached) at the seat of the Swiss garnishee, even if these claims relate to its foreign branches' business operations.[5]

[3] Decision of the Supervisory authority of the Debt Collection Office of Geneva of 9 October 2014, published in SJ 2015 I 49; Ochsner M., *La validation et la conversion du séquestre*, SJ 2016 II 1, p. 2.

[4] Decision of the Swiss Federal Supreme Court of 4 November 2013 (case reference 5A_846/2012, consid. 6.3).

[5] Decision of the Swiss Federal Supreme Court of 3 September 2014 (case reference 140 III 512, consid. 3), confirming its ruling in the case 128 III 473.

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?

A Swiss attachment order may be obtained in support of proceedings on the merits pending before state courts or arbitral tribunals abroad provided that the legal requirements are satisfied (*see* the answer to question 7).

Attachments are often the first step in enforcing foreign or domestic court judgments or arbitral awards. Indeed, pursuant to Article 271(1) no. 6 DCBA, the plaintiff may obtain an attachment if he or she 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 includes any enforceable domestic or foreign state court judgment or arbitral award.[6]

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[7]) or arbitral awards 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. The attachment court will rule on this issue as a preliminary matter, i.e., deprived of *res iudicata* effects,[8] for non-Lugano Convention judgments or by separate decision with *res iudicata*[9] for Lugano Convention judgments.[10]

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

[7] Decision of the Cantonal Supreme Court of Vaud of 12 April 2012 (case reference 115, consid. II, b, cc).

[8] JEANDIN N., *Point de situation sur le séquestre à la lumière de la Convention de Lugano*, SJ 2017 II 27, p. 39.

[9] *Ibid.*

[10] Decision of the Swiss Federal Supreme Court of 21 December 2012 (case reference 139 III 135, consid. 4.5.2); decision of the First Instance 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 pending 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* the answer to 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(1) 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, always. Applications for an attachment are by operation of law always dealt with on an *ex parte* basis and by means of expedited summary proceedings. The debtor will only be informed of the existence of an attachment application once the attachment has been ordered and enforced against his or her assets. If an attachment application is dismissed, the debtor will not even be notified of the unsuccessful attachment application.

Once the attachment is ordered, the DCO will notify the debtor about the attachment. If the debtor is domiciled abroad, notification must follow the rules governing 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 in the form of a submission with the court having issued the attachment order (for more details regarding the challenge proceedings, *see* the answer to question 20). The relevant starting point for this 10-day deadline is the moment of formal service on the debtor.[11] This is indeed fundamental because in practice, the debtor is frequently apprised of the attachment by his or her bank before formal service is carried out. This 10-day

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

deadline may be extended upon reasoned request, in particular when the debtor is not domiciled in Switzerland. Where several attachments are requested in different venues, each attachment order will be notified to the debtor separately. In such cases, the legal situation is not entirely clear regarding the relevant starting point for the 10-day deadline. To our knowledge, scholars unanimously opine that the 10-day deadline shall only start with the latest notification of minutes.[12] This position was, however, not yet confirmed by case law.

In case a bank account is attached, the bank (as any other garnishee) is only obliged to provide the DCO – and thus the creditor – with information as to the effectiveness of the attachment (i.e., whether the bank account still exists and – if applicable – whether funds were blocked and if so for which amount) after the attachment has become final, i.e., after the period to challenge the same has lapsed or if a challenge was raised but has been definitely set aside (appeals included).[13] In cases where the debtor is located abroad and where service of documents needs to be effected through judicial legal assistance proceedings or through consular or diplomatic channels, such essential information might thus only become available to the plaintiff at a (very) late stage.

Besides challenging the attachment order itself, the debtor may also file a complaint against its execution by the DCO (Article 17 DCBA). Grounds for such complaint may include attachments enforced over assets that the law designates as unseizable (*see* the answers to questions 14 and 16 hereafter) or attachments executed although the corresponding court order (a) does not contain all the legally required information or (b) does not adequately describe the assets to be attached.[14]

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

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[12] PAHUD J., *Le séquestre et la protection provisoire des créances pécuniaires, Dans le contexte interne et international*, Geneva, Zurich, Basle, 2018, p. 256; 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; WEINGART D., *Arrestabwehr – Die Stellung des Schuldners und des Dritten im Arrestverfahren, p. 141, in:* KOSTKIEWICZ J. K./MARKUS A. R./RODRIGUEZ R., *CIVPRO Band 7*, Bern, 2015.

[13] Decision of the Swiss Federal Supreme Court of 15 September 2016 (case reference 5A_407/2016, consid. 3.1).

[14] Decision of the Swiss Federal Supreme Court of 25 September 2017 (case reference 5A_394/2017, consid. 4.1.2).

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 make a *prima facie* demonstration supported by documentary evidence (to be provided in support of the application) of (i) the existence of a claim against the debtor which must be due and not already secured by way of a mortgage or pledge (personal guarantees being excluded[15]); (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 as follows:

1. the debtor has no fixed or permanent domicile (worldwide) 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 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 provisional or definitive certificate of shortfall (in German: *Verlustschein*; in French: *acte de défaut de biens*) against the debtor from earlier unsuccessful debt collection proceedings; or
6. the creditor holds a definitive title (in most cases an enforceable court judgment or award) to set aside an objection in debt enforcement proceedings (*see* the answer to question 4).

In practice, the most common grounds for attachment are no. 4 and 6 *above*. As ground no. 4 is subsidiary to any other grounds, it may not be relied upon (or only as an alternative pleading) when there is a court judgment or award available, in which case ground no. 6 must be argued.

[15] KUKO SchKG-Meier-Dieterle, Art. 271 SchKG N 6.

The main difficulty when seeking an attachment based on ground no. 4 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 demonstrating that the claim is governed by Swiss law; Swiss courts have jurisdiction over the merits of the case (if the attachment is sought beforehand); or, in presence of a contractual claim, showing that the contract was negotiated or entered into force or was (to be) performed in Switzerland. Pursuant to scholars and case law, the debtor's commercial activity, if linked to the claim at stake, can also constitute an element to prove a sufficient link to Switzerland even when the claim is not governed by Swiss law.[16]

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

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 an application by the plaintiff. The plaintiff must apply to the competent court at the place where the assets against which the attachment is sought are located or at the debtor's ordinary venue for debt collection (*see* the answer to question 3). Since each canton is sovereign to organise its court system, the type of court may vary from canton to canton.

The application is usually made in writing, although it could also theoretically be made orally in simple or urgent cases (Article 252(2) 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 and their location, the existence of a claim against the debtor (which must be expressed in Swiss francs) and the specific ground(s) on which the attachment is sought (*see* the answer to question 7).

[16] Decisions of the Swiss Federal Supreme Court of 2 November 2012 (case reference 5A_222/2012, consid. 4.1.2) and of 9 April 2013 (case reference 5A_581/2012, consid. 5.2.2; SJ 2013 I 498); decision of the Cantonal Supreme Court of Zurich of 16 November 2015 (case reference PS150154, consid. 3.1.1).

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. The court will then merely rubberstamp the same to serve as the attachment order if the court grants the application.

As far as evidence is concerned, the plaintiff bears the burden of proof but must only bring *prima facie* evidence of the relevant facts, namely:

(i) the existence of a monetary claim against the debtor, which is due and unsecured;

(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* the answer to question 7).

As a rule, only documentary evidence is admissible (Article 254(1) SCCP).

Prima facie evidence of the debtor's ownership over the assets is particularly important if the assets are formally registered in the name of a third party (acting as an undisclosed nominee for the debtor). In such case, the plaintiff must also explicitly designate the third party in the application[17] and adduce *prima facie* evidence that the true owner is the debtor, not the apparent/registered owner, which typically requires to establish an abuse of law (concept of piercing the veil).[18]

The evidentiary threshold is met when the judge considers the alleged facts to be credible despite possible doubts.[19]

[17] Decision of the Swiss Federal Supreme Court of 11 December 2014 (case reference 5A_615/2014, consid. 3.2).

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

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

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 scope of the Lugano Convention, no undertaking can be ordered 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 questionable despite having been established *prima facie* by the plaintiff. Practice shows that courts 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. This is perhaps because 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.

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 interest of loans or credits that might have to be taken out by the debtor to make up 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* the answer to question 20) or before the same by way of a preventive brief (inadmissible in the context of enforcement of

Lugano Convention judgments, *see* the answer to question 21). Such an application can be made at any time, either in writing or orally.

The court can subsequently increase or reduce the 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 an application for attachment are regulated by a federal tariff and range between CHF 40 and CHF 2,000 (cap) depending on the amount in dispute (Article 48 of the Fees Ordinance of 23 September 1996 to the Federal Act on Debt Collection and Bankruptcy). The court costs for objection proceedings (if applicable) depend on the value in dispute and are separate from the court costs relating to the application for attachment.[20]

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 potential damage that an unjustified attachment could cause to the debtor or third parties (namely the garnishee and/or the owner of the assets subject to the attachment). Such damage includes the amount of interest of loans or credits that may have to be taken out by the debtor to make up for the unavailability of the assets and all court costs and legal fees incurred by the debtor in relation to his or her motion to discharge the attachment or in relation to the validation proceedings (*see* the answer to question 9). The damage considered must however be actually incurred and not theoretical.

Although not confirmed by case law, legal scholars consider that as a ballpark figure, security corresponding to 10% of the (alleged) claim is usually appropriate.[21]

11. How specific must the application for an attachment be as to the nature, extent and location of the assets sought to be attached?

[20] Decision of the Cantonal Supreme Court of Zurich of 18 April 2017 (case reference PS170050, consid. III, 4.2).

[21] OTTOMANN R., *Der Arrest*, ZSR 115 [1996] 262; STOFFEL W., Basler Kommentar, SchKG II, 2nd ed. Basle 2010, Art. 273 N 22.

How many potential garnishees may be served with an order of attachment?

The plaintiff must identify the assets to be attached with as much precision as possible. The plaintiff should if possible identify specific assets. He or she may alternatively target merely generic assets of a certain type by referring to their holder (*e.g.*, all assets deposited in a given safe or with a specific financial institution), the so-called "generic" attachment. In case of a "generic" attachment, the assets to be attached can be identified only in general terms by their *genre* in the attachment application and their exact specification delayed until the seizure phase.[22]

With respect to assets held at a bank, the plaintiff is only required to identify the financial institution and bring *prima facie* evidence of a banking relationship between the latter and the debtor. Details of the bank account (*e.g.*, account number or IBAN) in which the assets are deposited or evidence of a positive balance on said account is however not required. So-called "investigative 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 prohibited under Swiss law. The threshold regarding the degree of evidence of the existence of assets in general, and bank accounts in particular, is high. The Zurich courts refused, for instance, to grant an attachment of banking assets on the basis of on mere hearsay, i.e. a confirmation from a third party assuring that he or she heard from another person that the debtor holds a bank account.[23]

The application must also mention any third parties who formally appear or are registered as the owners of assets (*e.g.*, the person or entity registered as account holder) over which the debtor has beneficial ownership[24] and the plaintiff must give *prima facie* evidence that the true owner is not the third party but the debtor.[25]

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[22] Decision of the Swiss Federal Supreme Court of 23 February 2016 (case reference 142 III 291).

[23] Decision of the Cantonal Supreme Court of Zurich of 5 September 2017 (case reference PS170179).

[24] Decisions of the Swiss Federal Supreme Court of 28 November 2014 (case reference 5A_25/2014) and of 11 December 2014 (case reference 5A_615/2014).

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

There is no limit to the number of potential garnishees that may be served with an attachment order. Indeed, as mentioned *above*, a Swiss court may issue various attachment orders to different DCOs in Switzerland if assets are located in different local jurisdictions throughout Switzerland (*see* the answer to question 3). If the garnishee is a Swiss bank with various branches in different local jurisdictions, the attachment application should as a rule be made at the seat as registered in the Swiss Commercial Registry (as opposed to the place of the branch). This is because, when the debtor is not domiciled in Switzerland, its assets are deemed located at the seat of the third party not at the latter's (registered) branch, which is devoid of legal capacity.[26] This will moreover allow the attachment to capture all assets held with the bank, regardless of whether they are managed at the seat or at any of the branches.

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 must attach the assets under his or her disposition up to the amount set out in the attachment order. However, a third party is only under an obligation to report on the effectiveness of the attachment as such, the nature and extent of the assets of the debtor in his or her possession or on any third party's rights on such assets, including his or her 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 10 day-deadline is the moment of formal service on the debtor and not the debtor's knowledge of the attachment (*see* the answer to question 6).

Once the attachment is final, the third party on whom an attachment order was served 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 (Article 91(4) by reference of Article 275 DCBA). Information on assets formally belonging to another third party

[26] Decision of the Supervisory authority of the Debt Collection Office of Geneva (case reference DCSO/415/2020), consid. 2.1.2 and 2.2.

must only be provided to the extent that the attachment order specifies that assets belonging to such third party are subject to the attachment.[27]

The third party who is served with an attachment order risks criminal prosecution if he or she fails to comply with the attachment order or 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(1) 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, existing claims against third parties and even joint accounts[28] 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.[29]

In principle, only assets that legally (and not just economically) belong to the debtor can be attached. Assets which do not (legally) belong to the debtor can however also be attached provided it can be established that the debtor had the same held through a legally separate entity with which he forms an economic unity abusively, i.e., with a view to escaping his obligations (so-called "*piercing the corporate veil*", in German: *Durchgriff*[30]),

[27] Swiss Federal Supreme Court of 15 September 2016 (case reference 5A_407/2016).

[28] Decision of the Cantonal Supreme Court of Zurich of 23 November 2017 (case reference NE170006, consid. 4.3.1).

[29] Decision of the Cantonal Supreme Court of Geneva of 26 February 2015 (case reference DCSO/103/2015).

[30] Decision of the Swiss Federal Supreme Court of 31 July 2019 (case reference 145 III 351).

or where it can be established that the apparent ownership of a third party is abusive (concepts of strawmen, etc.).[31]

Under Swiss law, future claims may only be attached if they can be sufficiently identified at the moment of the attachment application. 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 or her performance in a given competition (the European League, *in casu*) may be attached if the following elements are known at the time of the attachment application: (i) the period in which the competition takes place, (ii) the match schedule, (iii) the allocation key of future income, and (iv) the maximum amount that participating soccer players may earn.[32] By contrast, mere expectancies cannot be attached.

Finally, certain categories of assets of the debtor cannot be seized by law and can therefore not be attached (*see* the answer to 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".

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[31] Decision of the Swiss Federal Supreme Court of 7 June 2016 (case reference 5A_205/2016, consid. 7.2).

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

With respect to assets deposited in bank accounts, the object of the attachment is technically the claim from the debtor against the bank for 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* the answer to question 14).

For letters of credit of which the debtor is a 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.

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 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 (*see* the answer to question 18).

As regards temporal limits, the attachment lapses if the creditor (i) fails to comply with the deadlines set for validation of the attachment (provided by Article 279 DCBA); (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) 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 Insurance Policies, the Federal Act on Copyright, and the Swiss Criminal Code are reserved.

Moreover, portions of the debtor's (future and determinable) income(s) that the DCO deems indispensable to sustain the debtor's and his or her family's essential needs cannot be seized. In Geneva, the cantonal Court of Appeal issues yearly guidelines setting out the amount of said portions for the considered civil year depending on the status of the debtor (living alone or with a partner, with or without children, etc.).[33] Moreover, such future income can be seized at most during one year as of the seizure (Article 93 DCBA).

As regards immunity from attachment, assets that are linked to the private or commercial activities of a State, *i.e.*, acts made *de iure gestionis*, may be attached provided that the transaction out of which the claim against the foreign state arises has a "sufficient connection" to Switzerland (in German: *Binnenbeziehung*; in French: *rattachement suffisant*).[34] Conversely,

[33] Normes d'insaisissabilité pour l'année 2021, E 3 60.04, available at: https://www.ge.ch/legislation/rsg/f/s/rsg_E3_60p04.html (18 January 2021).

[34] Decisions of the Swiss Federal Supreme Court of 19 June 1980 (case reference 106 Ia 142, consid. 3b and 4) and of 1st September 2009 (case reference 135 III 608).

assets linked to the acts performed by a State in the exercise of its functions as a public authority, i.e., acts *de iure imperii*, are immune from attachment. The Swiss Federal Supreme Court has confirmed that the "sufficient connection" requirement is a jurisdictional requirement which precedes any consideration of enforcement.[35]

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* the answer to question 15), the attachment lapses if the plaintiff (i) fails to initiate proceedings to validate the attachment within the applicable time limits provided by Article 279 DCBA; (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 without any time limitation.

If the plaintiff 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, he or she must do so within 10 days of the notification of the minutes of the enforcement of the attachment (Article 279 DCBA). Aside from this, 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.

[35] Decisions of the Swiss Federal Supreme Court of 7 September 2018 (case reference 144 III 411).

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 available until their seizure. An attachment does not, however, grant the plaintiff priority over other creditors acting subsequently. 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 (Articles 281 and 112 DCBA; for more on priority between creditors *see* the answer to question 19).

An attachment of bank assets prevents garnishees – including custodian banks – from setting off their unsecured claims against the attached assets. If garnishees notify the DCO of their alleged counterclaim, the minutes of the attachment shall mention that the attached claim is disputed. Litigation between the plaintiff and the garnishees might ensue at the stage of seizure (Article 131 DCO).

Conversely, garnishees are entitled to enforce security interests in the attached assets despite the attachment. To be entitled as much, the garnishees must notify the DCO of their alleged preferential rights (Article 106 DCBA). If the plaintiff disputes the same, he can start litigation against the garnishee (Article 108 DCBA) pending which the latter is not entitled to pay itself by appropriating a corresponding part of the attached assets. In practice, banks (as third parties holding the attached assets) often enjoy a more favourable situation than ordinary garnishees since they generally have security interests (pledge or other preferential rights) vested in their clients' (debtors) assets pursuant to their contractual arrangements. As a result, litigation regarding the same is exceptional.

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 discharge the attachment or if such a motion was dismissed, and if the debtor has not timely objected to the debt collection proceedings then initiated by the plaintiff to

validate the attachment, the plaintiff may apply for the continuation of the debt collection proceedings. Debt collection shall proceed either by way of (i) bankruptcy if the debtor is registered with the Commercial Register in one of the capacities set out in Article 39 DCBA (Article 279 DCBA) of (ii) seizure of assets in other cases.

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). If conversely assets are seized, each member of a group of creditors is entitled to request their realisation, 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 same, which is extended as necessary in order to cover the claims of all the creditors of the group. Creditors who file their application for continuation after the 30-day deadline form 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 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 apportioned to the creditors based on the respective value of their accepted claim(s). The creditors' claims are assessed and, if approved by the receiver, allocated to different classes, depending on their nature. Priority is given to creditors with secured claims. These claims are satisfied out of the proceeds of the corresponding collaterals. Creditors with unsecured claims follow, in various classes

depending on the nature of their claim(s): (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 ordinary and unsecured claims accrued prior to the opening of bankruptcy proceedings. Creditors of an inferior class only participate in the distribution of the proceeds after creditors of a superior class have been fully satisfied. If the proceeds are not sufficient to satisfy all creditors in one class, they are distributed among them proportionally to the amount of their respective claim(s) as a so-called dividend payment.

Attachment proceedings are temporary in nature so that decisions rendered in this context are not *res iudicata*. Accordingly, an attachment application may be submitted numerous times despite its possible prior dismissal or revocation, save for situations of abuse of rights, which might exist if an application is based on exactly the same facts and circumstances as a previous one.[36]

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 a motion to discharge the same with the court having issued the order within 10 days "of learning thereof", which case law has specified to be as of receipt of the minutes of the attachment (Article 278 DCBA, *see* the answer to question 6). If filed within this 10-days deadline, the petition is considered timely and thus valid even if devoid of reasoning and/or of legal arguments. The Swiss Supreme Court further held that such "bare" petition can be substantiated with legal arguments at a later stage.[37] The Cantonal Supreme Court of Zurich even considers that the petitioner may do so even if he had been provided with a copy of the attachment application and its exhibits informally beforehand.[38] The only admissible means of evidence available in support of the motion to discharge are

[36] Decision of the Cantonal Supreme Court of Zurich of 31 March 2016 (case reference PS160037, consid. II., 3.2).

[37] Decision of the Swiss Federal Supreme Court of 13 April 2018 (case reference 5A_545/2017, consid. 3.1).

[38] Decision of the Cantonal Supreme Court of Zurich of 18 June 2020 (case reference PS190092, consid. 5.1.2).

documents, to the exclusion of witness testimony, which is deemed incompatible with the summary nature of the proceedings.[39]

In addition, an appeal (in German: *Beschwerde*; in French: *recours*) may be filed within 10 days before the cantonal Appellate Court against the decision ruling on the motion to discharge (Article 319 in relation to Article 309 SCCP). The appeal decision may further be challenged within 30 days of its receipt before the Swiss Federal Supreme Court by means of an appeal (Article 72 Swiss Federal Supreme Court Act).

It is noteworthy that during the discharge and possible resulting appeal proceedings, the attachment remains in force so that the assets remain attached.

Finally, the alleged debtor may at any time obtain the release of the attached assets provided that he or she posts adequate security in an amount corresponding to the concerned assets or, if their value is unknown, to that of the claim with interests and costs (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 interim measures, such as an attachment order or any other measure, might be sought and ordered against him or her without prior hearing may file a so-called protective. The purpose of the same is to set out in advance the potentially targeted party's defensive arguments against a potential *ex parte* application (Article 270 et seq. SCCP). The court will consider the protective brief only if an *ex parte* application (*e.g.*, for an attachment) is filed. In such case, it will in parallel serve the protective brief on the applicant. Conversely, a potential applicant considering applying for an attachment order cannot access a protective brief before filing his application even if he or she knows or suspects that his opponent filed a protective brief.

The protective brief remains in effect for six months after being filed, after which it may be renewed by a request for extension (and payment of related court costs). Protective briefs are, however, not permitted in enforcement proceedings under the Lugano Convention, given that a court

[39] Decision of the Swiss Federal Supreme Court of 26 June 2017 (case reference 5A_228/2017, consid. 3.1).

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 first hearing the judgment debtor. Said debtor is entitled to object to such a declaration of enforceability only at a later stage (Article 41 Lugano Convention).