

SWISS INVESTMENT REPORT* 7

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* The Swiss Investment Report is provided by Wenfei Attorneys-at-Law Ltd. (“Wenfei”), a Swiss law firm with its seat in Zurich, which has gained extensive experience in providing services in Greater China.

The Swiss Investment Report is especially designed for Chinese Investors, who are intending to extend their business to Switzerland or Europe or are already doing business in Switzerland.

Of course, the Swiss Investment Report is also addressed to any other person who is interested in obtaining background information on the Swiss investment-related legal framework as well as information on current developments in the Swiss legislation from a foreign investor’s perspective.

New Attachment law in Switzerland – changes for Chinese creditors?

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New Attachment law in Switzerland – changes for Chinese creditors

I. Topic

January 1, 2011 will be a historical date for the Swiss procedure law. A national civil procedure law will enter into force and supersede the 26 cantonal civil procedure laws. As of the same date, many other existing laws, such as the Swiss debt enforcement and bankruptcy law, will be revised.

The Swiss debt enforcement and bankruptcy law provides a right to a creditor to file an application for attachment of the debtors' property in order to secure its claims towards the debtor. The attachment law will also undergo substantial changes.

This Swiss Investment Report will focus on the rights of the creditor who wants to have property in Switzerland attached under the new Swiss attachment law.

II. Attachment application

Attachment of a debtors' property is a pure security measure in order to safeguard the enforcement of the creditor's claims.

Upon the approval of an attachment application from a creditor by the competent court, the court issues an attachment order and provides it to the competent debt enforcement office. The debt enforcement office consequently executes the attachment order and seizes the debtor's property and takes the adequate measures to secure the seizure of the debtor's property.

After the execution of the attachment order by the debt enforcement officer, the officer issues an attachment deed, which certifies the execution of the attachment and provides information about the seized property and an estimation of its value.

Such attachment deed will be provided to the creditor and debtor, as well as to any third party whose rights are affected by the attachment.

III. Jurisdiction

Under the current law, the application for attachment has to be filed at the local court, where the property is located. If the property of the debtor is located at different places within Switzerland, the creditor must file at each place an application for attachment.

The new law will improve the creditor's position and provides that an application for attachment may be filed either at the place where the property is located or at the place where debt enforcement may be started. Debt enforcement may particularly (but not only) be started at the place of residency of a natural person or registered seat of a company.

Furthermore, the new law provides that one competent court may attach property, which is located anywhere in Switzerland. As a consequence, the creditor will only have to file one application for attachment, even if the debtor has property at different places in Switzerland.

IV. Attachment for Swiss court decisions

Under the currently applicable law, a decision rendered by a Swiss court itself may not be a basis for applying for attachment, unless the debtor (i) does not have a permanent residency, or (ii) with the intention to elude the performance of its obligations is disposing its property, has been running away or is about to run away, or (iii) does not have a residency or seat in Switzerland.

The new law provides that the creditor may apply for attachment of the debtor's property in Switzerland based on an enforceable Swiss court decision.

V. Attachment for European court decisions

Under the new law, court decisions of a European state, which is member to the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (the "Lugano Convention") may be the basis for attachment. A court decision, which is sought to be enforced in Switzerland in accordance with the Lugano Convention, can be declared for enforceable by the same court, which approves the attachment. Under the revised Lugano Convention (it will also enter into force as per January 1, 2011), the creditor has to submit a copy of the foreign court decision, a declaration of the foreign court (as provided in Annex V of the Lugano Convention), and, if required, a translation of these documents. If the required documents are provided to the court, it court shall then immediately issue a declaration of enforceability and at the same time, if the prerequisites are met, also approve the attachment and issue the attachment order.

At that stage, the debtor may not be asked for a statement and the court shall not review the court decision.

VI. Attachment for Chinese court decisions and arbitral awards?

The question arises, if solely based on a foreign court decision outside of the applicability of the Lugano Convention (i.e. Chinese court decision) or a foreign arbitral award an attachment on the property of a debtor in Switzerland will be possible under the new law.

The answer is no. A foreign Non-Lugano Convention decision must be declared enforceable by the Swiss enforcement court in an enforcement procedure (so-called "Exequatur") before the creditor can apply for attachment of a debtor based on that decision. In such enforcement procedure the debtor has the right to provide a statement of defense and raise objections against the enforcement of the foreign court decision, such as violation of

the public policy of Switzerland. If a foreign arbitral award shall be declared for enforceable in Switzerland, the debtor may raise the objections pursuant to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

As a consequence, a creditor can not apply for attachment only based on a court decision or arbitral award rendered in China, if it was not first declared enforceable by a competent Swiss court.

However, it shall be stressed that a Chinese court decision or arbitral award may be the basis for an attachment, if additionally one of the following prerequisites is met:

- i) The debtor does not have a permanent residency;
- (ii) The debtor with the intention to elude the performance of its obligations is disposing its property, has been running away or is about to run away; or
- (iii) The debtor does not have its residency or seat in Switzerland.

Particularly the last prerequisite can be of importance, if a Chinese court decision or arbitral award was rendered against a person with a residency in China or a Chinese company, who has property (i.e. deposit on a Swiss bank account) in Switzerland. Under such circumstances attachment could be applied for without having first declared the Chinese court decision or arbitral award enforceable in Switzerland. However, the creditor shall credibly show to the court that all the preconditions of an enforceability declaration of that decision or arbitral award are met.

VII. Specification of the property by the creditor

Any property of the debtor can basically be subject to attachment, such as real estate, securities, deposits on a bank account, claims, stock in a warehouse, or commodities. The creditor however has to specify, which property of the debtor shall be attached, and the creditor has to provide prima facie evidence that the debtor is the owner of the property or entitled to the claim.

VIII. No secured claim by pledge

It is only possible to file attachment for a claim, if the claim is not secured by a “pledge” on movables or immovables.

IX. Establishing of prima facie evidence

The creditor does not have to furnish the strict proof that the prerequisites are met. If the creditor can provide objective facts and evidences (mainly documents), which brings the judge to the conclusion that the statements of the creditor are predominantly true, even though the judge is not completely convinced and still has some minor doubts, the creditor has principally provided sufficient proof.

X. Proceeding with the Attachment

The attachment procedure is an extraordinary remedy, since the creditor may have the property of the debtor attached without giving the debtor the right to be heard before the issuance of the attachment order by the court. Therefore, any remedy against the attachment order or next step of the creditor in order to enforce his claim must be taken within very short deadlines.

If the creditor has not already filed an enforcement application at the competent debt enforcement office before or together with the application for attachment of the debtor's property, the creditor must file such enforcement application or file a law suit against the debtor at the competent court within 10 days upon receipt of the attachment deed.

If the creditor files an enforcement application at the competent debt enforcement office and the debtor raises objection against the payment order (which was issued by the competent debt enforcement office based on the enforcement application), the creditor must file an application to remove the objection at the competent court or a law suit against the debtor within 10 days upon receipt of the notice that the debtor has raised objection (a copy of the payment order).

If the debtor has not raised objection against the payment order, the creditor must file the application to proceed with the debt enforcement against the debtor within 20 days upon receipt of the notice that the debtor has not raised objection (a copy of the payment order).

If the creditor fails to meet the above mentioned deadlines, or withdraws the lawsuit or debt enforcement application, or has its law suit finally dismissed, the attachment will cease to exist. As a consequence, the debtor will have the seized property again at its own disposal.

XI. Conclusion

The new attachment law brings several reliefs to the creditor who wants to secure the enforcement of its claims against a debtor. The creditor may choose to file application for attachment either at the place, where the debtor's property is located, or at the place of

debt enforcement. The competent court may attach all property located in Switzerland. An enforceable Swiss court decision entitles to apply for attachment.

A Chinese court decision or arbitral award first has to be declared enforceable by a Swiss court, before the creditor may apply for attachment against a debtor with residency or seat in Switzerland, unless the debtor - with the intention to elude the performance of its obligations - is disposing its property, has been running away or is about to run away.

A Chinese court decision or arbitral award, not declared for enforceable yet, may however be used as basis for an attachment application against a person without residency or seat in Switzerland, but having property in Switzerland.

Should you have questions regarding the information provided in this document, please do not hesitate to contact Dr. Paul Thaler (paul.thaler@wenfei.com).

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