

SEQUESTRATION OF ASSETS LOCATED IN SWITZERLAND AND BELONGING TO A DEBTOR DOMICILED ABROAD

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This presentation discusses the conditions to be met by a creditor who wishes to sequester assets held in Switzerland by a debtor who is not domiciled in that country.

INTRODUCTION

The sequestration provided for in Articles 271 to 281 of the Federal Act on debt collection and bankruptcy ("**FADB**") is an urgent protective measure that allows a creditor whose rights are threatened to temporarily restrict the powers of his debtor to dispose of some of his property¹.

It should be added to the above-mentioned definition that a sequestration is temporary in two respects:

- on the one hand, it tends to temporarily block certain assets of the debtor so that the creditor can be paid out of these assets, if he reaches the end of the proceeding for validating the concerned sequestration;
- on the other hand, Article 280 FADB provides that the effects of the sequestration cease when the creditor (i) allows the time limits assigned to him under Art. 279 FADB to elapse, (ii) withdraws or allows his action or lawsuit to lapse and (iii) has his action definitively rejected².

The sequestration is an institution of the debt proceedings. It aims at securing a claim that is the subject of a pending lawsuit or will be the subject of a future lawsuit³. There is no sequestration without a prior or subsequent lawsuit⁴.

To obtain a sequestration, the creditor must file an application for sequestration, either with the Court of the place where the goods are located, or with the judge of the forum of the lawsuit (Article 46 FADB).

This application must make it probable that the creditor's claim exists, that there is a case of sequestration and that there are goods belonging to the debtor.

Indeed, a sequestration can only be obtained if the conditions of Article 271 FADB are met, i.e. when there is a case of sequestration and the general conditions concerning the existence of a debt and the debtor's assets are met⁵.

As will be seen in this contribution, there are six cases of sequestration listed in Article 271 para. 1 FADB. However, in this contribution, we will limit ourselves to analysing only one case of sequestration, i.e. that applicable when the debtor is domiciled abroad (outside Switzerland).

GENERAL CONDITIONS OF THE SEQUESTRATION

According to Article 272 para. 1 FADB, the sequestration is authorised by the judge of the place where the goods are located, provided that the creditor renders plausible that, in a cumulative way:

- his claim exists;
- there is a case of sequestration; and
- there are assets belonging to the debtor.

These three conditions are discussed in more detail below.

¹ See Articles 271 to 281 FADB.

² See Article 280 FADB.

³ See decision of the Swiss Federal Court ATF 107 III 33.

⁴ See decision of the Swiss Federal Court ATF 42 III 342.

⁵ See Article 271 para. 1 FADB.



EXISTENCE OF THE CLAIM

The claim must be plausible, *i.e.* it must have arisen validly, be due and not be extinguished. It must also not be secured by a pledge, whether movable or immovable⁶. However, if the claim is only partially secured by a pledge, a sequestration is possible for the uncovered balance (Article 271 FADB).

EXISTENCE OF A CASE OF SEQUESTRATION

The creditor must also make the existence of "a case of sequestration" plausible. The law understands by "case of sequestration" any of the six following situations referred to exhaustively in Article 271 para. 1 FADB:

1. when the debtor has no fixed domicile;
2. when the debtor, with the intention of evading his obligations, makes his property disappear, flees or prepares to flee;
3. when the debtor is a transient or a visitor to a fair or market, if the debt is immediately due and payable by reason of its nature;
4. if the debtor does not live in Switzerland and there is no other case of sequestration, provided that the claim has a sufficient connection with Switzerland or is based on an acknowledgement of debt (Article 82, para. 1 FADB);
5. if the creditor has a provisional or final certificate of default against the debtor;
6. if the creditor has a definitive release order against the debtor.

As explained in the introduction above, only the case of sequestration provided for in Article 271 para. FADB will be analysed below.

CASE OF ARTICLE 271 PARA. 1 NO. 4 FADB

In the case of Article 271 para. 1 no. 4 FADB, the requesting creditor must demonstrate that the debtor "does not live in Switzerland". This expression refers to the absence of a domicile or registered office in Switzerland⁷.

Only the absence of a domicile or seat in Switzerland (interpreted as the existence of a domicile or seat abroad) is thus required by law.

The existence of a foreign domicile or seat of the debtor is not sufficient to obtain a sequestration under Article 271 para. 1 no. 4 FADB. The law adds the following alternative condition:

- the claim must have a sufficient connection with Switzerland; or
- it must be based on an acknowledgement of debt within the meaning of Article 82 para. 1 FADB.

These conditions are analyzed below.

SUFFICIENT CONNECTION OF THE CLAIM WITH SWITZERLAND

The notion of sufficient connection of the claim with Switzerland, which the legislator deliberately refrained from defining, still gives rise to controversy and hesitation. In its case law, the Swiss Federal Supreme Court has repeated that this concept should not be interpreted restrictively⁸.

The case law and the doctrine are almost unanimous in considering that the mere presence of the debtor's assets in Switzerland is not sufficient to establish a "sufficient link" with this country⁹.

⁶ See Articles 271 and 272 FADB.

⁷ See AJP/PJA 1996 p. 1421.

⁸ See decision of the Swiss Federal Court ATF 135 III 608.

⁹ See decision of the Swiss Federal Court TF 5A_222/2012.

However, this condition of a "sufficient link" with Switzerland is realised when the claim invoked by the creditor is subject to Swiss law or when the Swiss courts have jurisdiction¹⁰.

Also, according to the Swiss Federal Supreme Court, payment into a Swiss bank account in connection with the disputed contract may also constitute a sufficient connection to Switzerland¹¹.

For the rest, the existence of a sufficient connection with Switzerland must be assessed in the light of all the circumstances, balancing the interests of the creditor and those of the debtor¹².

ACKNOWLEDGEMENT OF DEBT PURSUANT TO ARTICLE 82 PARA. 1 FADB

A claim that is due and not secured by a pledge and for which sequestration is required against a debtor domiciled abroad pursuant to Article 271 para. 1 no. 4 FADB may, as an alternative to the assumption that there is a sufficient connection with Switzerland, be based on an acknowledgement of debt pursuant to Article 82 para. 1 FADB.

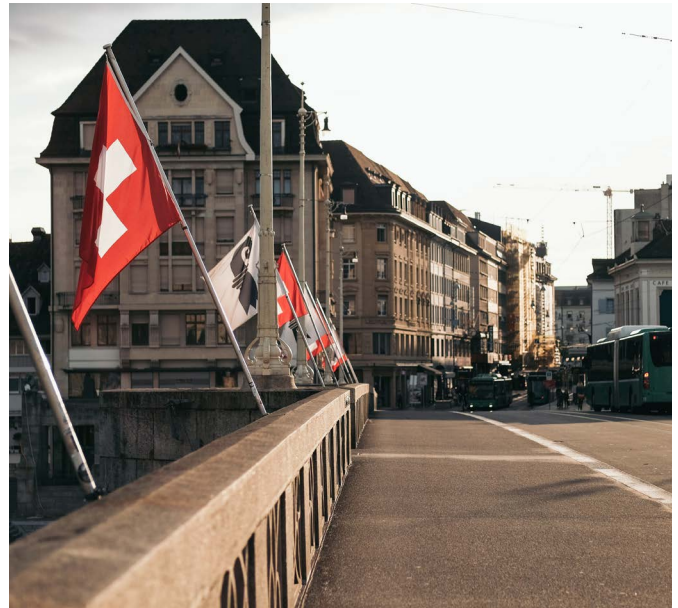
According to established case law, an authenticated or private deed signed by the debtor - or his representative - showing his willingness to pay the sequestering creditor, without reservation or condition, a specific or easily determinable sum of money that has fallen due, constitutes an acknowledgement of debt within the meaning of Article 82 para. 1 FADB.

EXISTENCE OF ASSETS BELONGING TO THE DEBTOR

Finally, only assets located in Switzerland may be subject to sequestration. The assets must be permanently located in Switzerland; it is not enough for the owner in transit to bring them into the country in order to retrieve them immediately¹³.

FORM OF THE APPLICATION FOR SEQUESTRATION

The creditor wishing to obtain a sequestration must file a signed or dictated written application with the competent court, in which the creditor must show that the above-mentioned conditions are likely to be met.



The degree of proof is that of mere plausibility¹⁴, i.e. the creditor does not have to provide strict proof of the facts he alleges in order to convince the judge to order the sequestration.

According to this principle, it is sufficient for the judge, based on objective elements, to have the impression that the relevant facts occurred, but without having to exclude the possibility that they might have taken place otherwise¹⁵.

This is a fact that the creditor can simply allege in his application for sequestration and that it will be up to any objector, if necessary, to contest in the subsequent sequestration opposition proceedings.

CONCLUSION

In conclusion, the creditor who intends to sequester the assets of a debtor in Switzerland who is not domiciled in that country will have (i) to make sure that he fulfils the conditions set out above and (ii) that he obtains as much information as possible in this context, in order to convince the judge of the validity of his claim.



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¹⁰ See decision of the Swiss Federal Court TF 5A_222/2012, c. 4.

¹¹ See decision of the Swiss Federal Court TF 5A_222/2012, c. 4.1.2.

¹² See decision of the Swiss Federal Court TF 5A_222/2012, c. 4.2.

¹³ See decisions of the Swiss Federal Court ATF 118 III 62, c. 1a, JdT 1994 II 78 ; ATF 107 III 147, consid. 4a, JdT 1984 II 24 ; ATF 102 III 94, consid. 1, JdT 1977 II 130.

¹⁴ See decision of the Swiss Federal Court ATF 132 III 715.

¹⁵ See decision of the Swiss Federal Court TF 5A_877/2011.

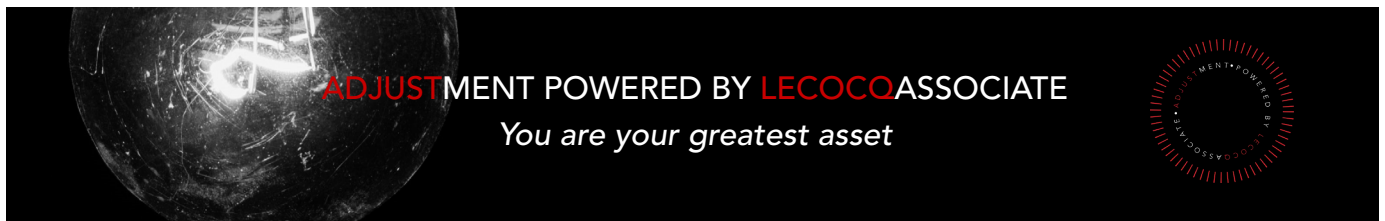
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