# DO YOU KNOW ABOUT THE SWISS WORLDWIDE FREEZING ORDER?

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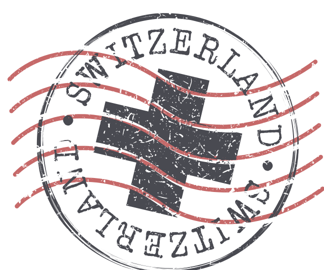
The worldwide freezing order (also known as Mareva injunction) available in common law jurisdictions has been described as one of the nuclear weapons of the law. The conjunction of an injunction that may be obtained ex parte and that restrains a defendant from disposing of its assets up to a certain value and its ancillary disclosure obligation requiring the defendant to provide an affidavit setting out the value and location of its assets is indeed an extremely powerful asset recovery tool that many practitioners in civil law jurisdictions envy.

***Few persons know, however, that an equivalent of the worldwide freezing order is available to litigants against Swiss defendants when they are insolvent or try to conceal their assets.***




In Switzerland, enforcement of monetary claims is mainly regulated by the Swiss Federal Act on Debt Enforcement and Bankruptcy ("DEBA").

DEBA provides for three types of bankruptcy procedures: ordinary bankruptcy (Article 159-176), bankruptcy for bill of exchange (Article 177-189), and bankruptcy without prior debt enforcement procedure (Article 190-194).

In the context of ordinary bankruptcy proceedings, a creditor must have completed the full debt enforcement procedure before being able to request from the court the bankruptcy of its debtor, which may take years if the claim needs to be recognized in a judgment. The bankruptcy for bill of exchange provides for a more expedited procedure but may take several months before interim measures are available.

Unlike the first two types of bankruptcies, bankruptcy without prior debt enforcement of Articles 190 and 191 DEBA, can, under certain conditions, be requested directly from the court.

The possibility for the creditor to request the bankruptcy without prior debt enforcement procedure exists only if creditors' interests are threatened within the meaning of Article 190 DEBA, namely:

- If the debtor has no known residence, if it has absconded in order to evade the fulfilment of its obligations, if it has committed or attempted to commit acts to defraud creditors or has concealed its assets during debt collection proceedings.
- If the debtor has generally stopped payments to its creditors. This condition is fulfilled if the debtor does not pay uncontested and due debts, if there are payment orders from various creditors to which the debtor consistently declares its opposition, or even if the debtor fails to meet minor debts. It is not required, however, for the debtor to stop all payments but it is, for example, sufficient if the refusal to pay concerns a substantial part of its business activities. Even a single unpaid debt could be sufficient to prove that the creditor's interests are threatened if the amount is significant and the refusal to pay lasts. This is notably the case when the debtor refuses to satisfy its primary creditor.

The procedure of bankruptcy without prior debt enforcement procedure is conducted through summary proceedings and the debtor has a right to be heard.

Under Article 170 DEBA, the judge has discretionary powers to order all interim measures deemed necessary in the interest of the creditors to prevent dissipation of assets.

These measures can be requested as soon as the bankruptcy request under Article 190 DEBA is filed and can be ordered ex parte.

Among such interim measures, the court may issue an order restraining the debtor from disposing of its assets worldwide. The creditor may in addition seek garnishee orders at the location of the debtor's assets when local conditions are met.

In addition, the court may order an inventory of the debtor's assets, compelling the debtor to disclose and document its worldwide assets to the local Bankruptcy Office, typically within ten days. The creditor has access to this disclosure and supporting documentation and may request the Bankruptcy Office to take additional steps. The creditor may then use this information to obtain garnishee orders, including outside of Switzerland.

Interim measures ordered on an ex parte basis cannot be immediately appealed against but must be first confirmed by the court after both the debtor and the creditor have been heard. Depending on the time of year, a hearing may only be scheduled after several weeks, which may feel like an eternity to the debtor.

The consequences of a breach of those orders are more dire than the breach of other court orders, which are usually only punished with a fine of up to 10,000 Swiss francs (Articles 292 and 323 of the Swiss Penal Code – "PC"), as under Article 169 PC, a person who disposes of an asset that has been frozen, prejudicing its creditors, is liable to imprisonment for up to three years.

***In short, Swiss bankruptcy law provides for interim measures, which combined effects are similar to a common law worldwide freezing order: 1) the debtor is restrained from disposing of its assets; 2) the debtor has an ancillary obligation to report on its assets worldwide; 3) the consequences of a breach of the freezing order are very severe, as they may be punished by a prison term of up to 3 years.***

These interim measures are, however, more limited than a worldwide freezing order, as they only apply to debtors residing in Switzerland who stopped payments, who absconded or concealed their assets, which is probably the reason why they are not more known globally. They remain nevertheless a very powerful tool in the arsenal of the Swiss asset recovery practitioner.

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