

Luxembourg's deep freeze

Fabio Trevisan, Bonn Steichen & Partners ▪ Laure-Hélène Gaicio, Bonn Steichen & Partners

Unpaid creditors are keen to freeze the assets of their debtors. Fabio Trevisan of Bonn Steichen & Partners says this is the best guarantee of obtaining payment after a final judgment is issued against the debtor.

In Luxembourg, it is possible to freeze temporarily the assets of a debtor through a so-called *saisie-arrêt*. These proceedings are not identical to freezing orders as they exist in other countries, but are rather proceedings mixing both principles of attachment proceedings and freezing orders.

This is the reason why *saisie-arrêt* is usually translated in English indifferently by the term 'attachment proceedings' or 'freezing orders.' Nevertheless, we believe the procedure is best described as an attachment proceeding. We will therefore use this term hereafter.

This being said, attachment proceedings (*saisie-arrêt*) under Luxembourg law are defined as proceedings by which a creditor attaches sums or assets held by a third party (the attached third party) and by which the creditor, after having followed the procedure outlined below, obtains delivery of the sums or assets owed by the third party to the (attached) debtor.

There are two phases in attachment, which are:

1. The 'conservatory' phase, during which the attaching party blocks all assets which the attached third party holds on behalf or owes to the attached debtor, and;
2. The 'enforcement' phase during which the attaching party seeks to obtain payment of his claim by the enforcement of the judgement by which the attachment is validated by the court.

The action for attachment is submitted to the law of the place where the assets to be attached are located. This remains true even if one or more of the parties or even where both the claimant (creditor) and defendant (debtor) are foreign residents or nationals.

Attachment procedure: conservatory phase

The legal base for an action for attaching assets is found in Articles 693 and 694 of the Luxembourg New Code of Civil Procedure (NCCP). Article 693 provides that:

"Every creditor by virtue of an authentic or private deed may attach within the hands of a third party sums (of money) or other belongings of his debtor, or oppose to their remittance."

Under this article, the claim which justifies the attachment has to be established by a deed, i.e. a final and binding judgement or notarial deed. In the case such a deed does not exist, Article 694 provides that:

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“If there is no such deed, the judge of the domicile of the debtor, and even the judge of the domicile of the attached third party may, upon written application, give his permission to place the attachment or practice the opposition.”

In the absence of an enforceable judgment or order, a petition (*requête*) must be made to the president of the court of the residence of the debtor or of the attached third party to obtain the authorisation for the attachment proceedings. This procedure is *ex parte*.

The petition must clearly identify the concerned attached third party. If the creditor knows the banks in which the debtor has a bank account, the petition may be limited to these banks. On the contrary, if such information is unknown, the petition will have to list as many banks as possible.

The conditions for an attachment are that the claim on which the action for attachment is based has to be certain, liquid and due – i.e. mature – for immediate payment at the time the attachment proceedings are being started, which means when the petition to the president of the court is filed.

If the authorisation for attachment is granted, the attaching creditor serves the presidential order to the attached third party. The effect of such notification is to block the funds or assets held by the credit institution or third party on behalf of the debtor.

The attachment triggers the unavailability of the debtor's credit balance on his bank accounts, as well as any assets he may have deposited. Once the attachment order is served, the attached third party is no longer authorised to allow the debtor to dispose of the attached funds or assets.

The debtor may, however, request a limitation of the effects of the attachment order (*cantonnement*) by initiating proceedings before the summary judge. In that case, the attachment may be limited by the court decision to a certain amount.

Validation procedure: enforcement phase

The attachment itself must be followed within eight calendar days by a court action filed at the initiative of the creditor – i.e. the attaching party – against his debtor in order to have the attachment validated. Article 699 NCCP requires that:

“Within eight days of the attachment, the attaching party shall inform the attached debtor and introduce a validation action.”

The deed served to the debtor is called ‘*dénonciation*’ and means that the debtor is simply informed of the existence of the attachment and is summoned to appear in court in view to have the attachment validated. Consequently, it is only upon service of this deed that the debtor becomes aware of the attachment.

After having initiated the validation action, the attaching party must proceed to the information of the attached third party by a so-called *contre-dénonciation*. This means that

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the bank is notified by a bailiff (*huissier de justice*) of the existence of the validation action and the regularity of the attachment procedure.

Upon fulfilment of these procedural steps, the proceedings will continue in front of the court by an exchange of briefs by the debtor's and creditor's lawyers, followed by a hearing scheduled before the Luxembourg Court. However, two situations have to be distinguished:

1. If the attachment proceedings have been started on the basis of an enforceable judgment in Luxembourg (a foreign judgment recognised in Luxembourg, for example) the validation action is limited to the validation of the attachment only.
2. If the attachment proceedings have been brought on the basis of a private claim, or the authorisation granted by the judge, the validation action is accompanied by an action on the main grounds before the competent court.

The competent court can be either a Luxembourg or a foreign court pursuant to the rules of private international law. The main action may be brought in the Luxembourg court that is competent for the attachment proceedings, should it also be territorially competent for the action on the main grounds.

The creditor must anyway obtain an enforceable judgment – i.e. a court decision ordering the debtor to pay his debt to the creditor – before the court can order the validation of the initial attachment.

The Luxembourg courts will issue a judgment validating or dismissing the attachment by stating that the claim did not possess the required conditions in the first place, or alternatively by acknowledging the failure of the claimant to produce an enforceable judgment.

If the attachment proceedings are directed to the freezing of liquid funds, the effect of the validation judgement is to enable the creditor to get direct payment from the attached third party. Consequently, the handing down of a decision validating the attachment is followed by a declaration procedure to ascertain whether the attached third party is a debtor of the attached debtor and to what extent (*procédure en déclaration affirmative*).

At the end of such a procedure, the attached third party must, in accordance with Article 707 NCCP, issue a declaration at the clerk's office of the competent court indicating the amounts he owes to the attached debtor, if any. For banks, this consists of indicating the total net assets inscribed on the debtor's bank account, if any.

It should finally be noted that, because banking secrecy is applicable in Luxembourg, banks are forbidden to reveal the existence of assets in the attached party's name until the court issues a final judgment validating the initial attachment order. Therefore, until the end of the proceeding, i.e. until the "*procedure en déclaration affirmative*," the creditor will not be aware if he attached assets or not. He won't even know for sure if there was an account at all.

Fabio Trevisan is a partner at **Bonn Steichen & Partners**, where he focuses mainly on dispute resolution and arbitration. He is involved in numerous shareholders' disputes, as

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well as high-stakes arbitration proceedings in almost all sectors, ranging from worldwide domiciliary groups and joint venture to retail and luxury hotel disputes.

***Laure-Hélène Gaicio** is a senior associate at **Bonn Steichen & Partners**. She focuses on arbitration, general commercial and litigation. She advises on a wide range of domestic and international arbitration proceedings.*

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