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# Requirements for attachment and applications for attachment – a checklist

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## I. Preparing for attachment

### A. Attachment proceedings: overview and sequence

Attachment<sup>1</sup> is a form of ex parte preliminary injunctive relief with no hearing of the attached debtor.<sup>2</sup> The attachment court does not hand down a judgment, but instead approves the attachment with an attachment order addressed to the debt collection authority (Art. 274 DEBA [Swiss Debt Collection and Bankruptcy Act]), whereupon the debt collection authority executes the attachment and freezes assets of the attached debtor (Art. 275 DEBA). In so doing, the debt collection authority applies provisions relating to seizure accordingly (Art. 275 DEBA).

By way of the objection to attachment [*Arrestesprache*] (Art. 278 (1) DEBA), the attached debtor can resist the court-ordered authorization to attach. Once the attachment order is final and enforceable, the authorization to attach procedure ends.

If the attached debtor wishes to resist execution of the attachment by the debt collection authority, that is done through the complaint under debt collection law. (Art. 17 et seqq. DEBA, procedure for execution of attachment).<sup>3</sup>

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This article is based on a speech given by the author on June 22, 2017 at the conference of the Institute for Legal Studies and Legal Practice at the University of St. Gallen (IRP-HSG) on the subject of "Attachment and other means of securing assets". – This checklist is intended to give anyone seeking justice a quick overview of the subject. This does not, however, relieve such a person of the obligation to research the specific points in greater detail, and in particular to consult the specialized literature on attachment law.

<sup>1</sup> <[www.arrestpraxis.ch](http://www.arrestpraxis.ch)> / <[www.attachment.ch](http://www.attachment.ch)> offers a comprehensive overview of the literature, the applicable legal rules, and the court decisions in attachment law. It is a pure know-how database.

<sup>2</sup> FSC 133 III 589; as a result, court holidays do not apply (Art. 145 (2) (b) CCP [Swiss Code of Civil Procedure], Art. 46 (2) FSCA [Swiss Federal Supreme Court Act]) and the grounds for appeal in proceedings before the Federal Supreme Court are limited to infringement of constitutional rights (Art. 98 FSCA).

<sup>3</sup> In DEBA complaint proceedings before the Federal Supreme Court, the grounds for complaint are not limited (FSC [Swiss Federal Supreme Court], 5A\_672/2010, January 17, 2011 = Pra 2011 no. 86).

An authorized attachment must be validated within a short (ten-day) period (Art. 279 DEBA, procedure for validation of attachment). If an enforceable instrument is already present,<sup>4</sup> validation takes place through debt collection and final dismissal of the debtor's objection to the order to pay [*Rechtsöffnung*] (Art. 81 DEBA). If an acknowledgment of debt is present (Art. 82 DEBA), the validation can take place through debt collection and preliminary dismissal of the debtor's objection to the order to pay (Art. 82 DEBA). If no instrument for preliminary or final dismissal of the debtor's objection to the order to pay is present, it is possible to carry out advance debt collection. If the debtor files an objection to the order to pay [*Rechtsvorschlag*], validation takes place through ordinary legal action before the domestic or foreign state court or arbitral tribunal with jurisdiction (Art. 79 DEBA). The easiest (first) type of validation is always the initiation of debt collection at a place of debt collection pursuant to Art. 46 et seqq. DEBA.<sup>5</sup>

Successful attachment proceedings end with the liquidation and distribution of the attached assets (with the involvement of any other creditors), after the attaching creditor has presented the motion to continue the proceedings following final dismissal of the debtor's objection to the order to pay (Art. 88 DEBA). However, an attachment does not give the attaching creditor a paramount right to the attached assets (Art. 281 (3) DEBA).<sup>6</sup>

An application for attachment can be re-filed at any time as long as it does not relate to circumstances that are completely identical to a previous application for attachment.<sup>7</sup>

A successful application for attachment does not mean that the attaching creditor immediately learns whether it was possible to attach assets of the attached debtor (mostly bank balances). The third party debtor (bank) is subject to a duty to inform only after the end of the objection period or – if the attached debtor has filed objection to the attachment – once the decision on the objection becomes final and enforceable.<sup>8</sup>

<sup>4</sup> Foreign or domestic judgment by a state court or an arbitral tribunal, in-court settlements, enforceable public deeds, rulings by Swiss administrative authorities, Art. 80 DEBA.

<sup>5</sup> Cf. in particular Art. 52 DEBA.

<sup>6</sup> Cf. the two exceptions in Art. 281 (1) (preliminary participation in seizure) and Art. 281 (2) DEBA (cost recovery).

<sup>7</sup> FSC 138 III 382.

<sup>8</sup> FSC, 5A\_672/2010, January 17, 2011 = Pra 2011 no. 86; this means that the attaching creditor is compelled to initiate validation before it is clear whether assets could

## B. Procedural requirements

### 1. Territorial jurisdiction

The court at the debtor's place of debt collection (Art. 46 et seqq. DEBA) or at the location of the assets (Art. 272 (1) DEBA) has territorial jurisdiction for the authorization to attach.<sup>9</sup> The location of the assets is determined according to the provisions pertaining to seizure (Art. 275 DEBA).<sup>10</sup>

Having this option allows for tactical considerations when choosing the forum for attachment (e.g., debtor with domicile in Zurich and vacation house in Ticino Canton; choice of court and of language, among other aspects).

### 2. Subject-matter jurisdiction

The state court under cantonal law has jurisdiction for the authorization to attach (§ 24 (c) GOG/ZH [Organization of Courts Act/Zurich Canton]: court comprising one judge sitting alone), but this cannot be a commercial court.<sup>11</sup> An arbitral tribunal is not authorized to hand down an attachment order.

### 3. Authority to order attachment throughout Switzerland

The attachment court with territorial and subject-matter jurisdiction can attach assets of the debtor throughout all of Switzerland (Art. 271 (1) DEBA).<sup>12</sup>

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effectively be attached, FSC 129 III 599 = Pra 2004 no. 102.

<sup>9</sup> There is disagreement about whether a validation at the location of the assets is permissible within the scope of application of the LC [Lugano Convention of October 30, 2007 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters].

<sup>10</sup> In principle, claims are located at the registered office of the attached debtor. If the attached debtor's registered office or domicile is abroad, claims of the attached debtor are considered located at the registered office of the third party debtor (e.g., a bank in Switzerland). FSC 140 III 512.

<sup>11</sup> BISchK 2015, 76 et seq.

<sup>12</sup> Authority to order attachment throughout Switzerland is one of the key new features introduced with the CCP and the LC as of January 1, 2011. The question of which court has territorial jurisdiction for the authorization to attach must be kept strictly separate from the question of what authorities the attachment court (with territorial jurisdiction) has (authority to order attachment throughout Switzerland).

#### 4. Other procedural requirements

As in any proceedings, in attachment proceedings the general procedural requirements such as capacity to be a party and capacity to take legal action must be credibly shown to be satisfied (Art. 66 et seq. CCP). The attachment court can also demand an advance for court costs (Art. 98 CCP).

### C. Substantive requirements

#### 1. Claim for attachment

The law specifies three requirements for the authorization to attach, which must all be satisfied: claim for attachment, ground for attachment, and debtor's assets (Art. 272 (1) DEBA).

The creditor must show that a claim for attachment is credible.<sup>13</sup> The attaching creditor has standing to sue and is the petitioner, while the attached debtor has standing to be sued and is the respondent.

If two or more persons have a claim (e.g., joint and several creditors, simple partnership), they collectively constitute the petitioners. If the claim for attachment is directed against two joint and several debtors, a separate application for attachment must be filed against each joint and several debtor.<sup>14</sup>

The claim is subject to the law elected by the parties or specified by rules of private international law. The attaching creditor must describe the basic elements of the foreign law in the application for attachment.<sup>15</sup>

The claim for attachment must be due and payable (Art. 271 (1) DEBA). If the ground for attachment is the lack of a fixed domicile and flight by the debtor (Art. 271 (1) no. 1 and 2 DEBA), attachment causes the claim for attachment to become due and payable.

The interest on capital and default interest (beginning of accrual of interest, amount of interest) should be included in the application for attachment. In the course of validation through debt collection, the application for attachment at

the place of debt collection for the assets (Art. 272 (1) in conjunction with Art. 52 DEBA) can no longer be increased (e.g., with the addition of interest).<sup>16</sup>

The claim for attachment may not be secured by pledge (Art. 271 (1) DEBA). If a lien already exists, the attaching creditor has no entitlement to additional security in the amount of the pledge. The term “pledge” [*Pfand*] is interpreted broadly.<sup>17</sup>

#### 2. Ground for attachment

In Art. 272 (1) DEBA, the law provides an exhaustive list of grounds for attachment. It is necessary to credibly show only one ground for attachment. The most common grounds for attachment are “attachment of a debtor domiciled abroad” and attachment based on a final instrument dismissing the debtor's objection to the order to pay (Art. 271 (1) no. 4 and 6 DEBA).

A requirement for attachment of a debtor domiciled abroad is that debt collection from the attached debtor in Switzerland is not possible, i.e., there is no place of debt collection pursuant to Art. 46 et seqq. DEBA (Art. 271 (1) no. 4 DEBA).<sup>18</sup> It is cumulatively required either that the claim for attachment have a sufficient connection to Switzerland or that the debt be based on an acknowledgment of debt. The “sufficient connection to Switzerland” is not interpreted restrictively.<sup>19</sup>

A requirement for instrument attachment is that the claim for attachment is identified through a final instrument dismissing the debtor's objection to the order to pay (domestic or foreign judgment, arbitral tribunal award, in-court settlement, enforceable public instrument,<sup>20</sup> ruling by a Swiss administrative authority, Art. 271 (1) no. 6 DEBA).<sup>21</sup>

<sup>13</sup> As with any claim-based proceedings, for simplicity's sake the principle of “who wants what from whom out of what” can be applied.

<sup>14</sup> FSC, 5A\_712/2010, February 2, 2011.

<sup>15</sup> FSC, 5P.355/2006, November 8, 2006 = Pra 2007 no. 47; FSC 140 III 456 = Pra 2015 no. 36. If the application for attachment is based on a claim about which judgment has already been handed down abroad, there is no longer any need to set forth the foreign law. In the case of a foreign judgment, the question instead concerns the rules by which it can be recognized and enforced in Switzerland.

<sup>16</sup> With validation through debt collection at the debtor's registered office/domicile, the debt collection petition can include a greater claim than in the application for attachment, because the place of debt collection is determined independently of a previous authorization to attach. However, the attached property includes only the amount of the claim for attachment, including interest, that was originally ordered by the attachment court.

<sup>17</sup> A provisionally recorded building contractor's lien does not constitute a lien pursuant to Art. 271 (1) DEBA; ZR 2016 no. 49.

<sup>18</sup> The nationality of the attached debtor plays no role, nor does the question of where and whether he has a registered office/domicile.

<sup>19</sup> FSC 123 III 494.

<sup>20</sup> FSC 137 III 87 et seqq.

<sup>21</sup> An attachment can thus be based on an enforceable Swiss judgment without debt collection having first

The other grounds for attachment specified in Art. 271 (1) DEBA – lack of fixed domicile in Switzerland or abroad (no. 1), flight by the debtor (no. 2), debtor in transit (no. 3), and debtor with certificate of unpaid debt (no. 5) – are rare in practice.

### 3. Debtor's assets

Examples of the debtor's assets include claims of the debtor, especially against his bank, shares of inheritances, wage entitlements, real property, including rent, stocks, jewelry, vehicles, works of art, etc.

Anything subject to seizure is also subject to attachment (Art. 275 DEBA). "Fishing expeditions" [*Sucharreste*], i.e., insufficiently specified applications for attachment, are not permitted (e.g., attachment at all banks in Zurich). "Type attachments" [*Gattungsarreste*], i.e., attachments where the assets are specified only by type, but the third party debtor (e.g., a bank) is clear, are permitted.<sup>22</sup>

### 4. Showing credibly

All requirements for the authorization to attach, the claim for attachment, the ground for attachment, and the debtor's assets must be shown credibly (Art. 272 (1) DEBA). The criteria for showing credibly are based on the case law relating to showing credibly, e.g., pursuant to Art. 82 DEBA, Art. 261 CCP, etc.<sup>23</sup> In de facto terms, this is a documentation process.<sup>24</sup>

The standard of proof for showing credibly relates to the authorization to attach procedure (application for attachment, objection to attachment, attachment deposit procedure) including appeal proceedings. It does not apply to other procedures relating to the attachment, e.g., the procedure for validation of the attachment through ordinary legal action, the procedure for appealing rulings by the debt collection authority, the third party objection procedure, or the

procedure for damages after an annulled attachment.

In practice, the requirements set out for credibly showing the assets are less stringent than the other two requirements for the claim for attachment and the ground for attachment.<sup>25</sup>

If the attachment is based on an instrument from the LC area, showing credibly pursuant to the DEBA is not required; a substantiated designation of assets (derived from the convention) is sufficient.<sup>26</sup>

## D. Other attachment topics

### 1. Attachment deposit

The attachment court can, at its own initiative with the authorization to attach, or upon application by the attached debtor in connection with an objection to attachment, issue the authorization to attach on the condition that the attaching creditor lodges security with the attachment court (attachment deposit) to cover the eventuality that the attached debtor (or a third party) suffers damage as a result of an unjustified attachment (Art. 273 (1) DEBA).

An attachment deposit is normally not imposed if the creditor bases its claim for attachment on an enforceable instrument.<sup>27</sup>

If the attachment is based on an instrument from the LC area, imposing an attachment deposit is not permitted, as that is contrary to the convention.

Any annulled (unjustified) attachment is unlawful and can result in an obligation to pay damages.<sup>28</sup>

### 2. Involvement of third parties

In the law of judicial execution, there is a principle that only the debtor's assets can be included in execution. By way of exception, however, assets of third parties can (also) be attached, as long as the requirements for pass-through effect (piercing the corporate veil) are satisfied.<sup>29</sup>

been initiated. This is one of the key new features introduced with the CCP and the LC as of January 1, 2011. A judgment by a Swiss cantonal supreme court is enforceable, [and] an attachment can be applied for independently of whether the judgment is being appealed to the Federal Supreme Court, Art. 103 (1) FSCA.

<sup>22</sup> FSC 142 III 291.

<sup>23</sup> FSC, 5P.248/2002, September 18, 2002 = Pra 2003 no. 71.

<sup>24</sup> FSC 138 III 636 = Pra 2013 no. 38.

<sup>25</sup> OGer ZH [Zurich Cantonal Supreme Court], PS120035, April 20, 2012; available at [www.attachment.ch](http://www.attachment.ch) – Decisions on Art. 272 (1) DEBA.

<sup>26</sup> OGer ZH, PS120081, May 18, 2012; available at [www.attachment.ch](http://www.attachment.ch) – Decisions on Art. 272 (1) DEBA.

<sup>27</sup> FSC, 5A\_225/2009, September 10, 2009.

<sup>28</sup> FSC 139 III 93.

<sup>29</sup> FSC, 5A\_225/2009, September 10, 2009; the mere fact of economic identity between the attached debtor and the third party (e.g., a company that belongs to him) is not sufficient – there must also be an abuse of rights.

When the application for attachment is filed, such third parties do not have standing to be sued, but after that they are entitled to bring an objection to the attachment in their own name (Art. 278 (1) DEBA), and in that way they become a party to the proceedings on the objection to attachment.

### 3. Other legal foundations for attachments

This overview does not address attachment proceedings on the basis of public law or international law (state attachment).<sup>30</sup>

## E. Execution of attachment

The authorization to attach is granted by the court, whereas the attachment is executed by the debt collection authority (Art. 275 DEBA). This means that in principle there is no need for the prayer for relief to contain motions relating to execution of the attachment. The court hands down the attachment order with the necessary content and serves it on the competent debt collection authority for execution (Art. 274 DEBA).

The debt collection authority establishes a freeze limit and attaches as much as seems necessary to satisfy the attaching creditor, including interest and costs (Art. 275 in conjunction with Art. 97 DEBA).

Because the attachment court has had the authority since January 1, 2011 to attach assets of the attached debtor throughout Switzerland, the question arises of whether the attachment court can designate a lead debt collection authority to coordinate execution of the attachment with the other involved debt collection authorities throughout Switzerland by way of mutual assistance and issue a single attachment deed, or whether the attachment court must task individual debt collection authorities with execution of the attachment of the attached debtor's assets situated in their own debt collection districts. Some courts order the execution of attachment by way of a lead debt collection authority, but the question has not yet been decided by cantonal supreme courts.<sup>31</sup>

<sup>30</sup> Especially tax law, criminal law, international transport agreements.

<sup>31</sup> E.g., District Court of Zurich; cf. FELIX C. MEIER-DIETERLE/REMO CRESTANI, Die schweizweite Zuständigkeit im Arrestvollzug [Swiss jurisdiction in the execution of attachment], AJP 2015, 1122 et seq.; NICOLAS JEANDIN, Point de situation sur le séquestre à la lumière de la Convention de Lugano, SJ 2017 II 27 et seq.; cf. BISchK 2015, 248 et seqq.

For that reason, it is worthwhile to present a procedural motion in the application for attachment to the effect that the attachment should be executed by a lead debt collection authority by way of mutual assistance if assets situated in different debt collection districts are to be attached.

## F. Protective letter

A debtor who wishes to resist an impending attachment proceeding in advance can file a protective letter with any attachment court that has territorial jurisdiction (Art. 270 (1) CCP).

## II. Applications for attachment

### A. DEBA applications for attachment

“DEBA applications for attachment” are applications for attachment where the debtor is domiciled abroad or the claim for attachment is based on a domestic judgment or a domestic public deed (Art. 271 (1) no. 4 and 6 DEBA)

A prayer for relief relating to authorization to attach might read as follows:<sup>32</sup>

It is moved that the following assets of the attached debtor be attached, all to the extent attachable up to an amount covering the claim for attachment of CHF ... plus interest at ... % since ... as well as costs:

- a) All assets of the attached debtor, especially claims, current account balances and cash in domestic and foreign currency, securities, deposits, precious metals, other assets and all rights of surrender relating to depositary agreements and fiduciary relationships, especially account no. ..., in the name and/or under the number and/or pseudonym of the attached debtor at the bank XY (*exact address*).
- b) The property at (*exact address*), land register sheet no. ..., cadaster no. ...
- c) 1 sculpture (*exact description*) in the property at (*exact description*).
- d) Vehicle (*exact description*), license plate ZH

Regarding execution of attachment by a lead debt collection authority, cf. section I.E. at the end.

A claim for attachment in foreign currency must be translated to Swiss francs in the application for attachment (Art. 67 (1) no. 3 DEBA).<sup>33</sup> If the attachment is validated through an ordinary legal action (Art. 279 (1) DEBA) and if the claim is for payment in a different currency, the ordinary legal action must be pursued in that currency.

<sup>32</sup> The ground on which the attachment is based pursuant to Art. 271 (1) no. 1–6 DEBA plays no role.

<sup>33</sup> FSC 137 III 623 = Pra 2012 no. 66.

If the application for attachment is dismissed in whole or in part, the remedy of appeal is available to the attaching creditor (Art. 309 (b) no. 6 in conjunction with Art. 319 (a) CCP).<sup>34</sup>

## B. LC applications for attachment

LC applications for attachment are applications for attachment based on a foreign decision or foreign public instrument from the LC area. When composing the prayer for relief, it is necessary to first check whether the foreign decision (or the foreign public deed) has already been declared enforceable in Switzerland.<sup>35</sup> If so, a simple DEBA application for attachment is sufficient.

If it has not yet been declared enforceable, the question is whether the foreign decision must first be declared enforceable and thus be considered a final instrument dismissing the debtor's objection to the order to pay (Art. 271 (3) DEBA), or whether an (implied) declaration of enforceability by way of incidental question [*vorfrageweise*] is sufficient. This question was not decided by the Federal Supreme Court in a proceeding in which it was the central question. But in a case in which various questions on the enforcement of claims arising from a foreign arbitral award were judged, the Federal Supreme Court stated that with LC attachments pursuant to Art. 271 (3) DEBA, a different solution is provided and a decision must first be made on the declaration of enforceability.<sup>36</sup> The practice in Zurich is focused on this Federal Supreme Court decision, but it is considered wrong.<sup>37</sup>

Proof of enforceability is provided with the certificate pursuant to Art. 41 in conjunction with Art. 53 et seq. LC. The attachment court may review this certificate only, but not additional requirements.

A prayer for relief relating to authorization to attach might read as follows:

1. It is moved that the judgment by the Regional Court of ... dated ... (case no. ...) be declared enforceable.
2. It is moved that the following assets of the attached debtor be attached, all to the extent attachable up to an amount covering the claim for attachment of

CHF ... plus interest at ... % since ... (*date*) as well as costs:

- a) All assets of the attached debtor, especially claims, current account balances and cash in domestic and foreign currency, securities, deposits, precious metals, other assets and all rights of surrender relating to depositary agreements and fiduciary relationships, especially account no. ..., in the name and/or under the number and/or pseudonym of the attached debtor at the bank XY (*exact address*).
- b) The property at (*exact address*), land register sheet no. ..., cadaster no. ...
- c) 1 sculpture (*exact description*) in the property at (*exact description*).
- d) Vehicle (*exact description*), license plate ZH ...

Otherwise cf. section II.A.

## C. PILA applications for attachment

PILA (Swiss Private International Law Act) applications for attachment are applications for attachment based on a foreign decision or foreign public instrument outside the LC area. Based on the practice of the Federal Supreme Court, the attachment court can (implicitly) review the declaration of enforceability by way of incidental question.<sup>38</sup>

The prayer for relief thus corresponds to that of a DEBA application for attachment (section II.A.).

## D. Applications for attachment based on arbitral awards

A domestic arbitral award is equivalent to a domestic judgment (Art. 387 CCP in conjunction with Art. 80 DEBA). The attachment court can (implicitly) review the declaration of enforceability of foreign arbitral awards by way of incidental question.<sup>39</sup>

The prayer for relief thus corresponds to that of a DEBA application for attachment (section II.A.).

## E. Proceedings

The following key considerations hold true of proceedings:

- authorization to attach: summary proceedings (Art. 251 (a) CCP).

<sup>34</sup> FSC, 5A\_508/2012, August 28, 2012 = Pra 2013 no. 56.

<sup>35</sup> Exequatur.

<sup>36</sup> FSC 139 III 135 = Pra 2013 no. 69, delib. 4.5.2. The Federal Supreme Court was not required to consider the question of how the attachment court must decide if the attaching creditor has not expressly moved for declaration of enforceability (principle of *non ultra petita*, Art. 58 CCP).

<sup>37</sup> ZR 2015 no. 79.

<sup>38</sup> FSC 139 III 135 = Pra 2013 no. 69; Art. 25 et seqq. IPRG [Swiss Private International Law Act], Art. 149 IRPG [sic]

<sup>39</sup> FSC 139 III 135 = Pra 2013 no. 69; Art. IV et seq. of the Convention of June 10, 1958 on the Recognition and Enforcement of Foreign Arbitral Awards (SR 0.277.12).

- validation of attachment through preliminary or final dismissal of debtor’s objection to the order to pay: summary proceedings (Art. 251 (a) DEBA).
- validation of attachment through ordinary legal action: ordinary or simplified proceedings (Art. 219 et seqq. CCP, Art. 243 et seqq. CCP).<sup>40</sup>
- validation of attachment through arbitral tribunal proceedings: applicable rules of arbitration.

### III. Attorney’s duties of care

#### A. Requirements for attachment, proceedings

Attachment proceedings can become very lengthy, expensive, and complicated and involve various other proceedings in addition to the actual validation of the attachment, accompanied by the respective opportunities for legal remedy (objection to attachment procedure, DEBA complaint procedure, third party objection procedure). Besides the general duties to inform the litigants of the requirements for authorization to attach, specific types of information relating to attachment law must also be provided.

#### B. Burden of validation

Each attachment must be validated, i.e., the blocked assets must ultimately be supplied for processing under the law on judicial execution. The deadlines of usually ten days are short, and depending on the contractual stipulation legal actions or arbitration proceedings must be initiated abroad (Art. 279 DEBA). This can become very time-consuming and expensive.

#### C. Risk of damages

Once an attachment is authorized, an attached debtor can no longer dispose of, for example, his bank accounts in the amount attached by the debt collection authority. If the attachment later proves to be unjustified (the attachment is annulled in the objection to attachment procedure or is not validated, or the attaching creditor is defeated in the validation procedure), the attaching creditor is liable to pay damages (Art. 273 (1) DEBA). If he has provided an attachment deposit, that serves as

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<sup>40</sup> Theoretically, validation through an action for legal protection is conceivable in clear cases pursuant to Art. 257 CCP.

the base for the attached debtor. Art. 273 DEBA establishes strict causal liability.<sup>41</sup>

#### D. Costs, compensation

The court fee in the authorization to attach procedure is based on the SF DEBA [Scale of Fees Swiss Debt Collection and Bankruptcy Act]. The costs of the authorization to attach may not exceed CHF 2,000 (1st instance) or CHF 3,000 (2nd instance; Art. 48, 61 SF DEBA). If the declaration of enforceability is decided on (only) by way of incidental question, then only the fee for the authorization to attach is incurred.

Within the scope of application of the LC, the court fee for the declaration of enforceability is based exclusively on Art. 52 LC. Accordingly, fees scaled in accordance with the amount in dispute cannot be charged. Otherwise (the PILA area), the fee is based on the cantonal rate scale. However, fees are imposed only if a decision has been made about the declaration of enforceability in the operative part of the ruling.

With unilateral authorization to attach, the attaching creditor is not awarded any counterparty compensation, because the attached debtor did not at all participate in the procedure.<sup>42</sup> However, counterparty compensation is incurred beginning with the (adversarial) objection to attachment procedure.

The amount in dispute is quantified in accordance with federal law (Art. 1 (c) in conjunction with Art. 91 et seqq. CCP) and stems from the purpose of the attachment proceedings, to secure enforcement. If the value of the attached assets is known, that amount constitutes the amount in dispute. If the value is not (yet) known, the amount of the claim for attachment is used. If a third party sues, the value of his assets covered by the attachment applies.<sup>43</sup>

#### E. Enforceable Swiss judgments

Since January 1, 2011, it has been possible to apply for attachment against debtors with registered office/domicile in Switzerland before debt collection is initiated, if the claim is based on

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<sup>41</sup> FSC 139 III 93.

<sup>42</sup> In practice, however, counterparty compensation is awarded with declarations of enforceability under the LC that are unilaterally decided without the debtor’s involvement, such as the authorization to attach procedure (Art. 41 LC).

<sup>43</sup> FSC, 5A\_789/2010, June 29, 2011; FSC 139 III 195; FSC, 5A\_28/2013, April 15, 2013.

an enforceable judgment or an enforceable public deed. Any judgment by a cantonal supreme court is enforceable (Art. 103 (1) FSCA). Trial lawyers are well-advised to refer creditors to this possibility and debtors to this risk while ordinary proceedings are going on.

An attachment of assets at the debtor's registered office/domicile does not result in a liquidation that is preferential for the creditor, but rather in seizure or bankruptcy. In de facto terms, the attaching creditor thus secures the debtor's assets for the benefit of all other creditors.<sup>44</sup>

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<sup>44</sup> Regarding the attaching creditor's few paramount rights, cf. section I.A.