

SWITZERLAND

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Civil attachment of aircraft

The attachment of a debtor's assets is a very convenient tool for securing the recovery of an outstanding claim.

Besides conventional assets, such as bank accounts or real estate, the creditor may also consider attaching more exotic items owned by the debtor: luxury cars, artworks or, why not, a private jet. We set out below the key requirements and certain practical aspects to consider when seeking the attachment of an aircraft located in Switzerland.

The requirements for attaching an aircraft: two different routes

Under Swiss law, outside criminal proceedings, the attachment of assets in view of securing a claim is governed by the Debt Enforcement and Bankruptcy Act (DEBA). The general conditions that the creditor must establish, on a *prima facie* basis, for an attachment to be ordered are as follows:

- the existence of its claim that must be due and unsecured;
- a ground for attachment; and,
- the existence of assets belonging to the debtor in Switzerland.

The grounds for attachment are exhaustively listed by DEBA as follows:

- The debtor has no fixed domicile.
- The debtor deliberately evades his/her obligations, removes his/her assets, leaves the country or intends to do so.
- The debtor's presence on Swiss soil is only transient.
- The debtor has no residence in Switzerland, provided that there is no other ground for attachment and the claim has a sufficient link with Switzerland or is based on an acknowledgement of debt.
- The creditor has obtained a definitive or provisional certificate of loss against the debtor.
- The creditor holds an enforceable

judgment.

As a matter of principle, civil attachment under Swiss law may only encompass assets legally owned by the debtor. It is only under exceptional circumstances that the attachment may extend to assets held in the name of a third party (company, fiduciary, and so on).

Whenever the attachment relates to an aircraft, certain specific provisions set forth in the Aviation Act (AA) will apply. It is worth noting that the requirements for an attachment under the AA are less strict compared to the DEBA; in particular, the creditor does not need to render likely the existence of any particular grounds for the attachment. Moreover, the attachment under the AA can be ordered even if the claim is already secured. The possibility to seek an aircraft attachment under the AA is, however, subject to other restrictions. Indeed, it may only be ordered provided that no judgment has yet acknowledged the creditor's underlying claim. Further, the attachment may only target Swiss and foreign aircrafts landing or parked in Switzerland, provided that the jurisdiction where the aircraft is registered ensures reciprocity. Finally, the AA ring-fences specific types of aircrafts from any conservatory measures, such as aircrafts allocated to the exclusive service of a state, as well as aircrafts of airline companies operating public transportation.

The rules of the AA are deemed *lex specialis* and therefore prevail on the DEBA. However, whenever the AA does not apply, notably if the creditor holds an enforceable judgment against the debtor or in case the attachment relates to a foreign aircraft registered in a jurisdiction that does not grant reciprocity to Switzerland, the DEBA will solely apply.

Practical aspects and risks to consider

The attachment judge renders his decision on an *ex parte* basis. The attachment order may be subject to the performance by the creditor of an upfront bond (usually set at around 10% of the claim amount) as security for any loss that the debtor or third parties may suffer in case the attachment proves unjustified. If the attachment is granted, the debtor will be heard at a later stage, notably after the enforcement of the attachment order by the competent authority. However, if a debtor anticipates that its assets might be the target of an attachment, he may file a preemptive

(protective) brief with the relevant court, arguing ahead of the creditor why any attachment request should be dismissed.

The attachment of an aircraft is implemented by the immediate service of the judge's order on the relevant Swiss airport, respectively the relevant charter company in the case of a private jet, for the purposes of preventing the aircraft's takeoff. The creditor will also be requested to bear upfront costs related to the maintenance (unless a contract entered into by the debtor covers such maintenance costs) and parking of the aircraft. Such costs can be substantial depending on the type of aircraft. Moreover, the creditor faces the risk of liability claims in case the aircraft is damaged as a result of its grounding.

Once granted, the attachment must be validated by the creditor within the allocated deadline, failing which the attachment will be automatically lifted. The validation occurs with the filing of a claim on the merits before the competent court, in Switzerland or abroad. Alternatively, when the attachment is based on the DEBA, the validation can also occur by initiating debt collection proceedings in Switzerland. This option is often preferred for cost-efficiency purposes.

Outlook

Switzerland is an important hub in international air traffic, and the country attracts many wealthy individuals travelling with their private jet. Against this backdrop, the attachment of an aircraft belonging to a debtor might be an interesting path to explore in the context of claim recovery efforts. The attachment of an aircraft may indeed favour a prompt settlement, however creditors should be aware that this comes along with certain legal hurdles and is not totally risk-free from a financial perspective.

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