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Money laundering

An illicit act paves the way for a sequestration under the LP ?

Par Teymour Brander le 26 September 2022

Can the injured party of a money laundering act committed by a foreign debtor apply for LP sequestration of assets located in Switzerland ? In its published decision 5A_709/2018, the Swiss Federal Supreme Court examines the condition of a sufficient link between the claim and Switzerland as a condition for the admissibility of a sequestration under art. 271 para. 1 no. 4 LP.

In criminal proceedings in Italy, Marc is accused of breach of trust (appropriazione indebita) for embezzling over EUR 100 million by collecting payment for television broadcasting rights at artificially inflated prices.

In short, a company based in Italy paid the broadcasting rights, at an inflated price, to a company based in Ireland – owned by Marc – which in turn transferred the sums received to an account opened with a bank in Lugano. This account was held by two offshore companies in which Marc was a shareholder.

In the end, Marc was not convicted by the Italian courts because the statute of limitations had expired. The injured parties therefore turned to Switzerland and requested the sequestration of the account opened with the bank in Lugano. The request for sequestration was based on art. 271 al. 1 ch. 4 LP, Marc being an American citizen residing in the United States. The Ticino courts held opposing views, but in the end the receivership was granted by the cantonal court of last instance.

Before examining the Federal Court's analysis, it is worth briefly outlining the motivation of the sequestering creditors and the reasoning of the Ticino Tribunale d'appello :

In essence, the sequestering creditors argue that there is a sufficient link with Switzerland because the place where the breach of trust relating to the payment of the broadcasting rights arose is in Switzerland, at the bank in Lugano. In so doing, they relied on the offence that gave rise to Marc's criminal charges.
The Tribunale d'appello of Ticino ordered the sequestration on the basis of a different connecting factor to that put forward by the sequestering creditors. It rejected their argument on the grounds that the alleged breach of trust had already occurred in Ireland, the Italian company having paid the price of the broadcasting rights to a company based in Ireland. However, the cantonal court held that the subsequent payment into a Swiss bank account could constitute

money laundering (art. 305bis of the Swiss Penal Code), which would have occurred in Switzerland.

On appeal by the sequestered debtors, the Federal Court must examine whether a case of sequestration exists within the meaning of art. 271 al. 1 ch. 4 LP, i.e. more precisely, whether the disputed claim has a sufficient link with Switzerland.

Art. 271 al. 1 ch. 4 LP concerns sequestration against a debtor domiciled abroad (Ausländerarrest) ; this is admitted under two alternative conditions : (i) the claim has a sufficient connection with Switzerland, or (ii) the creditor has the benefit of an acknowledgement of debt. Our ruling concerns the first condition.

As a preliminary point, the Federal Court recalls that the mere location of assets in Switzerland does not constitute a sufficient connection. A claim has a sufficient connection with Switzerland if (i) the Swiss courts have jurisdiction under the connecting rules of the LDIP or (ii) the claim is subject to Swiss law. Moreover, it is not necessary for the link with Switzerland to be more important than the link with other countries.

The relevant connecting rule in this case is art. 129 al. 1 LDIP, which bases the jurisdiction of Swiss courts on the place where an unlawful act has occurred.

In casu, the Federal Supreme Court first confirms the opinion of the cantonal court that the reason put forward by the sequestering creditors does not meet the requirements of art. 271 al. 1 ch. 4 LP. The place where the breach of trust relating to the payment of the broadcasting rights occurred was in Ireland, not Switzerland.

Relying on ATF 129 IV 322, the Federal Court goes on to point out that an act of money laundering committed in Switzerland constitutes an unlawful act (art. 41 CO) and, consequently, accepts that the injured party’s claim may have a sufficient link with Switzerland by virtue of the connecting criteria of art. 129 al. 1 LDIP. In other words, the injured party of a predicate offence to money laundering committed in Switzerland by a foreign debtor generally has a claim with a sufficient connection to Switzerland within the meaning of art. 271 para. 1 no. 4 LP.

This being the case, the Federal Court reminds us that the sequestering creditor must allege the facts constituting the case for sequestration and produce the means of proof that make them likely (art. 272 al. 1 LP). In our case, it is therefore up to the creditor to demonstrate the likelihood of a case of money laundering within the meaning of art. 305bis of the Swiss Criminal Code.

In this case, the sequestering creditors had in no way put forward the motive of money laundering. In this context, the Tribunale d’appello of Ticino exceeded its review powers by analyzing a connecting factor that had not been raised by the applicants. In other words, the Federal Court considers that the cantonal court should not have examined ex officio whether a case of money laundering had occurred.

In so doing, the Ticino Court of Appeal acted arbitrarily. The appeal was allowed and the sequestration annulled.

This ruling – while harsh on the sequestering creditors – is welcome in two respects.

Firstly, the Federal Court confirms the existence of a potentially sufficient link with Switzerland in a case where the creditor alleges an act of money laundering committed in Switzerland by a foreign debtor. Doubts on this point had persisted due to an earlier ruling by the Zürcher Obergericht denying a sequestration case in such a context (ruling NN990019 of February 26, 1999, reported in : Breitschmid P., PJA 1999, 1022, n. 3.2.7).

Secondly, this judgment reminds the sequestering creditor that he bears the burden of alleging and substantiating a case of sequestration. In the event of a petition based on an unlawful act against a foreign debtor, the sequestering creditor must therefore in practice (i) identify the relevant unlawful act and (ii) allege the facts that make it likely.
