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Enforcement and international sanctions

According to the Obergericht from Zurich, the freezing of assets under the LEmb takes precedence over the LP

Par Joël Pahud le 14 January 2025

In judgment PS240181 of 14 November 2024, the Zurich*Obergericht* ruled that art. 44 of the Swiss Criminal Code applies by analogy to asset freezing measures taken under the Embargo Act and its implementing ordinances, despite the absence of any reference to the Embargo Act in art. 44 of the Swiss Criminal Code. It follows that realisation under the LP is not possible as long as the assets are frozen.

On 6 June 2023, a creditor with an enforceable judgment from the Luxembourg District Court obtained a sequestration order against a debtor in Zurich in accordance with art. 271 ff LP. In particular, a banking relationship in Zurich is involved. Subsequently, at the attachment stage, the bank informed the debt collection office that the relationship in question was subject to an asset freeze ordered by the State Secretariat for Economic Affairs ('SECO') pursuant to art. 15 para. 1 of the Ordinance instituting measures in connection with the situation in Ukraine ('Ukraine Ordinance').

The Debt Enforcement Office then asked the creditor to produce the Luxembourg judgment, with a view to forwarding it to SECO for examination. We infer from a recital in the judgment (no. 4.1) that SECO apparently intended to examine whether an exceptional authorisation to release assets was relevant, which would have enabled the bank assets in question to be realised for the benefit of the creditor in accordance with the LP.

On 30 July 2024, the Debt Enforcement Office suspended the realisation procedure after noting that the creditor had not produced the Luxembourg judgment. The creditor lodged an unsuccessful complaint with the lower cantonal debt collection and bankruptcy supervisory authority (art. 17 LP). She then appealed to the Zurich*Obergericht* , the higher cantonal supervisory authority (art. 18 LP), arguing that the decision of the debt collection office to ask her to submit a copy of the Luxembourg judgment for examination by SECO was null and void.

The creditor appellant's main argument is that the LEmb is not mentioned in art. 44 LP, which reserves 'the realisation of objects confiscated under federal or cantonal laws on criminal or tax matters or under the Law of 18 December 2015 on assets of illicit origin'. In essence, this is a case of qualified silence on the part of the legislator. The Debt Enforcement Office should therefore not have requested SECO's assistance, and the proceedings should have gone their own way.

The*Obergericht* dismissed the appeal. Leaving open the question of whether the freezing of assets under Article 15 para. 1 of the Ukraine Ordinance was based solely on Article 2 para. 3 of the Federal Act on the Prevention of Money Laundering and Terrorist Financing or also on Article 184 para. 3 of the Swiss Constitution, the*Obergericht* held that, in both cases, enforcement under the Federal Act on Money Laundering and Terrorist Financing must take precedence. The*Obergericht* points out that the Federal Supreme Court has already ruled that Art. 44 LP applies by analogy to decisions of the Federal Council ordering the freezing of assets on the basis of Art. 184 para. 3 Cst (BGE 131 III 652). According to the Federal Court, '[t]he measures – orders or decisions – taken on the basis of the constitutional norm in question are, as a rule, almost by definition *praeter legem* and in a way replace laws that do not exist'. It follows that a restraint order issued on the basis of Article 184 para. 3 of the Constitution must be treated as a criminal or tax law within the meaning of Article 44 of the LP.

As for the LEmb, the*Obergericht* points out that its meaning and purpose were not to allow the adoption of orders that were less extensive than those based solely on art. 184 para. 3 Cst. On the contrary, the LEmb lays down the framework for the introduction of more extensive ordinances. Thus, according to the Obergericht, an ordinance issued on the basis of the EML is also an ordinance within the meaning of the above-mentioned case law of the Federal Supreme Court, which in a way replaces the law.

We note, moreover, that the Federal Court has already indicated in an *obiter dictum* that the application by analogy of art. 44 LP applies *'without doubt also'* to orders adopted pursuant to the LEmb (TF 5F_2/2011 of 12 May 2011 rec. 3.3.1 ; cf. also Meier-Dieterle/Keller, Der Arrestvollzug bei Banken, ZZZ/PCEF 62/2023, p. 146 ff, p. 153 ; Pahud, Le séquestre et la protection provisoire des créances pécuniaires, 2018, p. 167 par. 463).

In our view, the consequences of this case law are as follows :

– As long as assets are subject to a freezing measure based on the MIA, these assets may be sequestered or seized by the debt enforcement office, but they cannot be realised under the LP.
– A freezing order under the BESA also prevails if it is made after a sequestration or seizure order under the LP.

– Creditors are referred to the competent authorities under the BESA. Essentially, the latest ordinances based on the MGBA, including the Ukraine Ordinance, provide that SECO may, exceptionally, authorise the release of frozen economic resources in order to, among other things, prevent hardship, honour existing contracts or honour claims in application of a judicial, administrative or arbitral decision (cf. in particular art. 15 para. 5 of the Ukraine Ordinance or art. 2 para. 3 of the Venezuela Ordinance). SECO's decision in this regard may be appealed to the Federal Administrative Court (see e.g. Federal Administrative Court ruling B-547/2023 of 7 November 2023).

An appeal has been lodged with the Federal Court against the judgment of the*Obergericht* (5A_802/2024).

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