

Switzerland

SWITZERLAND: CIVIL ATTACHMENT (FREEZING ORDER) OF FUTURE CLAIMS

*Discussion of Decision 5A
_328/2013 Dated
November 4, 2013 by the
Swiss Federal Supreme
Court*

☞ Attachment orders; Debts;
Enforcement; Football clubs;
Switzerland

Facts

By award of October 12, 2011, the Court of Arbitration for Sports (CAS) ordered X, a Russian football club, to pay approximately €1.8 million to Y, a Portuguese corporation. However, X did not pay the said amount.

On July 30, 2012, Y applied to the attachment judge of Nyon, Switzerland, to attach (freeze) any claims which X has vis-à-vis the Union des Associations Européennes de Football (UEFA) in order to secure the payment of the debt determined in the aforementioned CAS award. Y argued that X participated in the 2012/13 UEFA Europa League and that, by then, X had progressed to the third qualifying round. It proved, based on an official UEFA document, that all clubs which progress to that stage are entitled to receive €200,000 from UEFA and even more if they progress to further stages. Y requested that not just this €200,000 but all claims of X vis-à-vis UEFA up to the amount of the CAS award be attached.

The attachment judge of Nyon, at the domicile of UEFA, immediately ordered said attachment. X filed an opposition and an appeal pursuant to the applicable procedural rules, however, both were dismissed. Therefore, it addressed an appeal to the Federal Supreme Court (FSC), requesting that the attachment be lifted.

Held

The FSC confirmed that the attachment may be upheld.

Initially, the FSC reminded the appellant that it only has limited power to review appeals on the subject of attachments, such power being restricted to the examination of whether the appealed decision was rendered in an arbitrary way. Hence, the FSC would only examine whether the award was manifestly untenable, whether it gravely misjudged a clear statutory provision or legal principle or whether it breached the common sense of justice and fairness in a shocking way.

The main issue of the appeal concerned the extent of the attachment, i.e. the question whether the attachment only extended to claims of X vis-à-vis UEFA which were already due at the relevant moment of the judgment on the opposition against the attachment (i.e. on October 11, 2012) or whether claims which fell due at a later time were also covered by the attachment. This was crucial as X progressed further in the Europa League and the claim it had vis-à-vis UEFA grew considerably after October 11, 2012.

The FSC held that, pursuant to its constant case law, even claims which are not yet due may be attached, as long as they are not simple expectancies or claims which might or might not originate. However, it outlined in detail

that it was being discussed controversially whether claims may be attached which will only fall due if certain suspensive conditions are fulfilled. The majority of leading authors accept the attachability of conditional claims as long as the chances of the condition entering into force are probable or at least not absolutely undeterminable.

The FSC then repeated the rationale of the court of lower instance and the arguments brought forward by X. Said court had determined that the claim at hand (the claim of X vis-à-vis UEFA based on its participation and progress in the Europa League) was a conditional claim which could be attached. In its appeal, X had argued that the extent of the claim was yet uncertain as the Europa League 2012/13 had not yet finished and that, therefore, the claim was to be qualified as a simple expectancy which cannot be attached by principle. However, the FSC rejected the allegations of X and confirmed that the court of lower instance had not rendered its decision arbitrarily and that said decision was to be upheld. It further added that the claim was, even though its extent was not yet known to the last cent at the relevant point in time, quite easily determinable as it referred to a clear time period (2012/13) and a clear competition (Europa League) and as there already was a binding schedule of UEFA on the amount which the clubs participating in the Europa League would receive on which date for which progress in the competition.

For these reasons, the FSC rejected the appeal and therewith confirmed that the attachment had not been ordered arbitrarily.

Discussion

The attachment of a claim or any other asset pursuant to art.271 of the Swiss Debt Enforcement and Bankruptcy Act will, if confirmed or not opposed and if the subsequent necessary steps are taken, finally lead to the liquidation of such a claim or asset in favour of the person having applied for the attachment. This can be a very helpful way of forcing a debtor which is unwilling to honour a court decision to pay its debts. However, it involves a rather formal procedure and short deadlines which means that it is advisable to prepare with great care an attachment request and the subsequent procedure.

One of the big advantages of the attachment as described above is that it will be ordered (if all prerequisites are fulfilled) *ex parte*. Only once the attachment is ordered and enforced will the owner of the attached asset be notified and he may then file an opposition against the attachment. The attachment will not be lifted unless there is a final and binding court decision determining that the attachment is not justified.

The instrument of attachment may be used for any asset or claim which is situated in Switzerland. The location of a claim lies, at least as long as Swiss law applies on the claim and as long as there is no differing contractual agreement, at the domicile of the creditor of the claim to be attached if such domicile is in Switzerland. If this is not the case, the attachment may also be pronounced at the Swiss domicile of the debtor. Other assets are situated where they physically lie.

An attachment will only be pronounced if the requesting party can show credibly that:

- (a) it has a claim against the owner of the claim or other assets to be attached;
- (b) that there are grounds for attachment (e.g. an enforceable judgment on the existence of the claim or a written recognition of debt); and
- (c) that there are claims or assets which are owned by the debtor. It is not necessary that these three prerequisites are strictly proven; rather, *prima facie* evidence is sufficient.

Thus, an attachment will be ordered if the court believes that the existence of the elements described is plausible even though it is still possible that the contrary might be true. Obviously, the threshold to be reached for this depends on a subjective judgment of the competent attachment court and therefore on its discretion. Not all courts in Switzerland, however, apply this discretion identically which makes strategic planning worthwhile, namely if there are several competent courts. It is noteworthy, though, that so-called fishing exhibitions are not allowed.

Considering that many international sports associations are domiciled in Switzerland and as many national associations, clubs or even athletes may have claims against such associations, an attachment of such a claim might be an interesting option for a creditor of a national association, a club or athlete seeking to attach its debtor's assets. The same applies for a debtor who has taken up employment in Switzerland as his/her salary claim is located in Switzerland and therefore generally attachable to a certain extent. The decision discussed in this article might help to motivate creditors to seek the help of an attachment judge in order to be able to enforce their claims.

Eva Gut-Schweizer

Staiger, Schwald & Partner Ltd Zurich

Christoph Gasser*

Staiger, Schwald & Partner Ltd Zurich

* Eva Gut-Schweizer and Christoph Gasser are both members of the major Swiss business law firm Staiger, Schwald & Partner Ltd and advise clients in various matters of intellectual property, litigation, bankruptcy and arbitration matters, contractual law and sports law. Eva Gut-Schweizer was also, between 2004 and 2011, a member of the working group on doping controls of the Swiss Federal Commission on Sports.