

ATTACHMENT OF ASSETS

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Attachment of Assets

The attachment of assets in France is regulated by Statute n° 91-650 of July 9, 1991, “reforming the civil procedures of execution” (hereafter the “1991 Statute”) and its implementing Decree n° 92-755 of July 31, 1992, “establishing new rules relating to the civil procedures of execution giving effect to Statute n° 91-650 of July 9, 1991, reforming the civil procedures of execution” (hereafter the “1992 Decree”). Both the 1991 Statute and the 1992 Decree came into force on January 1, 1993. They repealed the Articles governing the attachment of assets and execution measures as found in the former 1806 Code of Civil Procedure that had partially survived the coming into force of the Code of Civil Procedure on December 5, 1975.

The following questionnaire will mainly address provisional attachments pending the obtainment of an “enforceable title” (“*titre exécutoire*”), (hereafter “conservatory measures”, i.e., “*mesures conservatoires*”), bearing in mind that the discussion below focuses on the general conditions applicable to such conservatory measures.

1. What is the general nature and effect of judicial measures available for plaintiffs to obtain provisional relief affecting property of debtors to obtain security for judgments to be obtained (“attachments”)? Freezing property in place? Placing it in the custody of a third party, such as a court official, sheriff or marshall?

Under French law, assets may be attached on an interim basis for the purpose of securing the safety of the creditor’s endangered rights. There are two kinds of attachments, i.e., conservatory measures: conservatory seizures (“*saisies conservatoires*”) and judicial securities (“*sûretés judiciaires*”), which differ in nature (1) and effects (2).

(1) General nature of the attachments

(1.1) Conservatory seizures may be used against movable assets, whether material, e.g., a television set, or immaterial, e.g., patents, monies on a bank account and claims of the debtor against third parties, even where such assets are entrusted to a third party and

even where they are subject to prior conservatory seizures (1991 Statute, Articles 13 and 74, and 1992 Decree, Article 220).

(1.2) On the contrary, judicial securities may be used against real property, e.g., a house, business, and securities and shares (1991 Statute, Article 77, and 1992 Decree, Article 250).

(2) General effects of the attachments

(2.1) The aim of conservatory seizures is to prevent the debtor from disposing of his assets and frustrating the creditor's rights. Therefore, the effect of conservatory seizures is to freeze the seized assets that cannot be removed from the care and/or estate of the debtor and/or third party (1991 Statute, Articles 29 and 74). Seizures against claims suspend the calculation of time-limits (1991 Statute, Article 29).

(2.2) The effect of judicial securities is to entitle the creditor to a right over the assets, which is enforceable against third parties after proper registration and/or notification. However, it does not prevent their sale by the debtor, in which case the creditor is entitled to receive part of the sale price (1991 Statute, Article 79).

2. What is the form of the attachment? Injunction? Other kind of judicial order? Specify.

As a matter of principle, the attachment of assets is made by judicial order rendered by the judge upon the creditor's *ex parte* application ("*ordonnance sur requête*") (See Question 5 above for the exceptions). The creditor then has to have the judicial order served by bailiff to the debtor and/or third parties detaining the debtor's assets.

3. What is the jurisdictional basis for an attachment? Is the presence of the debtor's property a sufficient basis for an attachment to be obtained, assuming other requirements are satisfied? To what extent may attachments be used as a basis for obtaining personal jurisdiction over a debtor? To what extent are attachments or similar orders intended to have extraterritorial effect?

The judge's jurisdiction to order an attachment of assets (1) does not confer grounds for jurisdiction to hear the dispute on the merits (2). Also, jurisdiction is limited to assets located in France (3).

The response below concerns French law as applied when the Council Regulation (EC) n°44/2001 is not applicable.

(1) The judge's jurisdiction over the attachment of assets

The judge of the debtor's residence has jurisdiction to order a conservatory measure for domestic cases (1992 Decree, Articles 9 and 211).

However, for international cases and as a matter of principle, jurisdiction of French courts is based on the location of assets in France.

Where the debtor has no residence in France or its residence is unknown, the creditor may request the attachment before the judge who has jurisdiction over the place where the assets are located (1992 Decree, Article 9).

Under French law, only the execution judge ("*Juge de l'exécution*"), a civil judge of the *Tribunal de Grande Instance*, has jurisdiction to order an attachment of assets, even when proceedings on the merits are pending before another judge (1991 Statute, Articles 8 and 69). However, in commercial matters and before any trial, the President of the Commercial Tribunal ("*Tribunal de Commerce*") has concurring jurisdiction with the execution judge of the *Tribunal de Grande Instance* to order the attachment of assets.

(2) Lack of international jurisdiction on the merits on the grounds of *forum arresti*

Forum arresti is a theory whereby the judge's jurisdiction to order an attachment of assets located within a country is extended to jurisdiction over the merits of a dispute where the debtor does not have any residence within the country. The Court of final appeals in France ("*Cour de Cassation*") once decided that where a French judge had jurisdiction to order the attachment of assets located in France, the French judge also had jurisdiction to hear the dispute concerning the

claim on the merits against the debtor whose residence was not in France (the *Nassibian* case, November 6, 1979). Therefore, *forum arresti* was considered as grounds for international jurisdiction on the merits pursuant to this ruling of the *Cour de Cassation*.

However, this ruling was reversed in later decisions by the *Cour de Cassation* dated January 17, 1995 (*SARL Méridien Breckwoldt et Cie v. Cie béninoise de navigation maritime*) and February 11, 1997 (*Société Strojexport v. Banque Centrale de Syrie*). As the law now stands, a French judge may not hear a dispute on the merits when his sole basis for jurisdiction is the location of assets in France.

(3) The territorial limitation of jurisdiction for the attachment of assets

The international jurisdiction of a French judge is based on the location of assets in France. A French judge's jurisdiction is therefore limited to assets in France and attachment orders will not have extraterritorial effects. However, the *Cour de Cassation* declared that when a third party domiciled in France is requested to declare assets detained on behalf of the debtor, the debtor's assets have to be declared whether they are detained in France or abroad (*Cour de cassation*, May 30, 1985).

4. May an attachment be obtained in support of a proceeding on the merits in another country? If so, may the other proceeding be in court, arbitration or in another type of forum? Are attachments used as a mechanism in enforcing judgments or arbitral awards?

An attachment of assets may be obtained in France in support of foreign proceedings whether these proceedings are pending or to be initiated before a foreign court or an arbitral tribunal.

Also, attachments of assets are used in France as a mechanism in enforcing foreign judgements or arbitral awards. As detailed in the response to Question 19 below, a creditor may request the forced execution of his rights against the assets of the debtor on the face of a foreign judgement or arbitral award that is declared enforceable in France further to an exequatur procedure. On the face of the foreign

judgement or arbitration award and prior to any enforcement procedure, the creditor may request conservatory measures against the debtor's assets located in France, which will have to be later converted into execution measures for the purpose of enforcing the final decision on the merits.

5. What are the requirements for obtaining an attachment. Of property in your country? In support of a proceeding in another country, if different?

A judge's authorization is generally necessary for the enforcement of a conservatory measure (1991 Statute, Article 67, and 1992 Decree, Article 210).

Where the creditor has an enforceable title (see definition under Question 19 below), the attachment may be implemented without the prior authorization of the judge (1991 Statute, Article 68).

In addition, the prior authorization of the judge is not required when the creditor's claim concerns a default of payment of a promissory note, a bill of exchange, a check, a rent based on a written contract (1991 Statute, Article 68).

In the absence of an enforceable title, the creditor may request from the judge the authorization to employ conservatory measures if he relies on a monetary claim that seems well-grounded as a matter of principle, and circumstances that are likely to endanger the recovery of the debt (1992 Decree, Article 210). A well-grounded claim may be evidenced by a foreign judgement, the enforcement of which will be brought before the French Judge, and/or by pieces of evidence supporting the claim on the merits. A well-grounded claim is not necessarily a determined certain claim. The 1991 Statute deliberately removed the condition of emergency. Circumstances that endanger the creditor's chances of debt recovery generate a risk that the debtor may dissipate or conceal his assets so as to frustrate the execution of a judicial decision on the merits. The mere fact that the debtor fails to answer the creditor's claim may amount to a circumstance characterizing an endangered recovery.

6. May an attachment be obtained without notice to the debtor? If so, what are the requirements for notifying the debtor and

what procedure is available to the debtor to challenge the *ex parte* attachment obtained? If not, what are the procedural requirements for obtaining an attachment on notice to the defendant?

As mentioned above, a conservatory measure is ordered by the judge at the request of the creditor. It follows that attachment of assets are granted in *ex parte* proceedings, i.e., in the absence of the debtor. The fact that the debtor remains unaware of the process until the assets are effectively attached guarantees the effect of such process, which is to prevent the dissipation of assets by the debtor for the purpose of evading its obligations towards the creditor. When granting the order of attachment, the judge may also decide that the matter will be heard in *inter partes* proceedings, i.e., in the presence of the debtor (1991 Statute, Article 69, at paragraph 3).

In any event, the attachment of the debtor's assets must be notified to the debtor within eight days following the implementation of the attachment of assets in most circumstances. If the notification does not take place in due time, the attachment of assets may be cancelled.

The debtor may challenge the attachment obtained by the creditor in *ex parte* proceedings before the judge who pronounced the attachment order (1991 Statute, Article 72, and 1992 Decree, Articles 217 and 218). The judge will pronounce the release ("*mainlevée*") of the attachment of assets unless the creditor shows that all of the above conditions for the attachment of assets have been met.

In addition, upon request of the debtor, the judge may substitute any measure with the initial conservatory measure (1991 Statute, Article 72).

- 7. What are the elements that must be established to the satisfaction of the court for it to grant an attachment, e.g., likelihood of success on the merits, likelihood that the debtor is removing, or will remove, its assets from the jurisdiction, fraudulent activity by the debtor, need for the attachment as security, for an expected judgment or award?**

See Question 5 above.

8. What is the procedure for obtaining an attachment? What is the nature and extent of the evidence that must be presented to the court and how must it be presented?

The creditor's application for the attachment of assets must be submitted to the judge with all supporting evidence necessary to convince the judge that the attachment must be granted (see Question 5 above for the applicable tests). However, bearing in mind that the debtor may ask the judge to release the attachment if the conditions are not met, creditors must be cautious when submitting their *ex-parte* application because the court may award damages in addition to such release, especially if the creditor has deliberately not produced documents showing that the claim was in fact not eligible for attachment.

9. To what extent, and under which circumstances, is an undertaking, in the form of a third party bond or guarantee or a deposit, required in order to obtain an attachment? In what amount, in relation to the amount claimed, is the undertaking required? How are such undertakings generally obtained, as a matter of practice? How much do they cost?

Under French law, the creditor does not have to provide a third party bond or guarantee or a deposit to obtain the attachment of the assets. However, such requirements could be requested from the creditor prior to the 1991 reform (Article 48 of the former Code of Civil Procedure).

10. What does the undertaking secure? Damages to the debtor if the attachment is ultimately vacated? Do such damages include interest? Other elements? Legal fees? To what extent? Court costs? To what extent?

This issue will not be dealt with as the creditor is not required to provide a guarantee.

11. How specific must the application for an attachment be as to the nature, extent and location of the assets sought to be attached? How many potential garnishees may be served with an order of attachment?

The creditor must submit all information necessary for the validity of the order to be rendered by the Judge. As a matter of law, the order

must specify the total amount of the monies to be attached, corresponding to the amount of the debt to be recovered, and the nature, identification and location of the assets to be attached (1991 Statute, Article 69, and 1992 Decree, Article 212). Such specifications will be described in the evidence submitted by the creditor to the judge.

The number of garnishees that may be served is not limited in theory, bearing in mind that each notice of the attachment order that is served to a garnishee has to comply with and fall within the scope of the said attachment order.

12. What are the obligations of a third party who is served with an order of attachment to report on the nature and extent of the assets of the debtor in his possession, and the extent to which other persons, including the party served itself, have prior or competing liens on the property covered by the attachment order?

The third party is under the specific duty to provide information regarding the assets that he holds on behalf of the debtor to the creditor: the third party must declare to the bailiff requesting such information the nature and value of the assets to be attached and whether they are subject to prior attachments (1991 Statute, Article 44, 1992 Decree, Articles 224 and 99, 237). If he fails to provide the bailiff with adequate information, he may be held liable vis-à-vis the creditor.

13. To whom are such reports given and what is the form of such reports? To the court? To the attaching plaintiff? What is the form of such reports? In writing? Oral? Informal? Hints?

The third party's declaration regarding the assets of the debtor is given to the bailiff, whether in writing or orally, but in the latter case the bailiff drafts a report on the verbal answers of the third party.

The third party's declaration and/or the bailiff's report are conveyed to the creditor, and in some instances, may be notified to the debtor.

14. What kind of property of a debtor may be attached? Debts of third parties to the debtor? Claims of the debtor against third parties? Expectancies?

As a matter of law, all the assets of the debtor stand as a guarantee to his creditors (French Civil Code, Article 2284). All the assets of the debtor may be attached in principle, including both conditional assets and assets which will accrue over time (1991 Statute, Article 13).

Movable (material or immaterial), and immovable assets may be attached.

(1) Movable assets

All the movable assets may be subject to conservatory seizures (1991 Statute, Article 74, and 1992 Decree, Articles 221 to 233), including sums of money owed to the debtor by third parties (1992 Decree, Articles 234 to 243), and securities and shares (1992 Decree, Articles 244 to 249). Also, some specific movable assets may be subject to judicial seizures, i.e., business, securities and shares (1991 Statute, Article 77, and 1992 Decree, Article 250).

(2) Immovable assets

Real property ("*immeubles*") may be subject to judicial securities but not to conservatory seizures (1991 Statute, Articles 74 and 77, and 1992 Decree, Article 250).

15. What is the effect of the service of the order of attachment on assets of the debtor that came into possession of the garnishee after the time of service of the attachment order. Are there any time limits on the effectiveness of an order of attachment? In particular, what is the effect of the service of the order of attachment on a bank that has issued or confirmed a letter of credit of which the debtor is a beneficiary?

Service of order of attachment on assets of the debtor on the garnishee specifies the attached assets. Therefore, assets that come into the possession of the garnishee after the time of service of the attachment order may not be covered by such service. However, the service of the attachment order may have provided for the attachment of conditional assets and assets that will accrue over time. Besides, monies to be attached on a bank account will be subject to transactions that were commenced before service of the attachment order, and which are being processed at the time of such service.

As far as time-limits are concerned, the creditor has a three months' delay as of the rendering of the judge's order to have it implemented over the assets, e.g., to have the attachment order served by bailiff on the debtor and/or a third party detaining the debtor's assets (1992 Decree, Article 214).

With regard to the letter of credit, there is an established line of case law certifying that the creditor of the beneficiary of the letter of credit may have such letter attached. The letter of credit may be attached within the hands of the bank.

16. Are there certain kinds of assets or property of a debtor that are immune, or in some other way protected from attachment, e.g., pension funds, salaries, wages, diplomatic property, other sovereign property, other property specified under consumer-protection laws?

Immunity of attachment results either from the person of the debtor or the nature of the assets.

Conservatory measures are not applicable against persons who benefit from immunity of execution (1991 Statute, Article 1). For example, immunity of execution benefits the French State, French City Councils, French State Offices such as hospitals and universities, foreign States and diplomatic agents.

Certain assets may not be attached based on their specific purpose or use to the debtor (1991 Statute, Article 14).

For example, personal property necessary to the life and work of the debtor and his family cannot be attached. However, such assets may remain attachable if they are located in a place other than where the debtor habitually resides or works, or if they are valuable assets.

Objects indispensable to handicapped persons are also unattachable assets as a matter of principle.

17. For how long may an order of attachment remain in effect? If the attachment order is in support of a proceeding in another forum, are there any requirements concerning when, in

relation to the date of the issuance of the order of attachment, the proceeding in the other forum must be commenced? Completed?

As mentioned above at Question 15, a judge's attachment order may be implemented for three months as of its rendering.

Once the assets are attached, the order of attachment is effective until the discharge (if any), or, for the purpose of enforcement after the conversion of the conservatory measure into an execution measure once an enforceable title has been obtained.

If no proceedings on the merits were initiated abroad prior to the attachment of assets in France, such proceedings must be initiated before the foreign court having jurisdiction within one month of the implementation of the attachment order, failing which such order shall lapse (1991 Statute, Article 70 and 1992 Decree, Article 215).

18. What rights in the plaintiff are created by the service of an order of attachment? Priority over creditors attaching later? Do banks and other garnishees have set-off or other priority rights superior to those of creditors attaching assets of debtors who are also debtors of such garnishees?

With the answer to Question 1 above in mind, priority among creditors is different depending on the nature of the conservatory measures.

(1) Conservatory seizures

Where the assets are material assets, such as furniture or equipment, they are attached as a whole by the first creditor. However, other creditors may also attach the assets, as a result of which they will have a concurring right with the first creditor. In any event, certain creditors may have a security interest over the attached asset, which will prevail over the rights of unsecured attaching creditors.

Where the assets are monies owed by a third party to the debtor, including sums deposited by the debtor on a bank account ("*créances de sommes d'argent*"), the creditor who first attaches such assets will obtain a privilege right over the funds up to the amount of his claim. Up to such amount, funds are considered secured for the sole benefit of the attaching creditor. The portion of the funds that remain not attached

may be attached by a second creditor. Therefore, creditors may follow each other until all the funds are depleted, and, accordingly, the issue of priority among them is irrelevant in this case.

(2) Judicial securities

With regard to judicial securities, the creditor's rights over the attached assets depend on the basis of his rights and the order in which they are registered, i.e., each creditor who registers his secured right shall have priority over the subsequent creditors as a matter of principle.

(3) Banks and other garnishees set-off or priority rights

If the bank or other garnishee has a set-off or priority right, he is under the duty to declare such rights to the bailiff, who may nevertheless attach such assets. The position of garnishee does not confer as such any specific creditor's rights, bearing in mind that the garnishee may also be one of the debtor's creditors, in which case he may assert his rights like any other creditor in compliance with the rules described above at Paragraphs (1) and (2) of this Question.

19. How are attachments ultimately enforced as judgments? What is the procedure? What happens if multiple plaintiffs seek judgments against the same property at roughly the same time?

Attachment orders are ultimately executed when they have been converted into forced execution measures on the face of an enforceable title. Enforceable titles are characterized by an enforceable judicial French decision, a foreign act or judgement, or arbitral award that has been declared enforceable by a final decision, an extract from notes of a mediation that have been signed by the judge and parties, and other deeds with the effects of a judgement at law (1991 Statute, Article 3).

Depending on the nature of the conservatory measure, the procedure of enforcement will be conducted in accordance with the corresponding execution measures, which are the final aim and primary interest of the 1991 Statute and 1992 Decree. We will not address those procedures, which would be too detailed for the purpose of this questionnaire.

With regard to execution measures on assets attached by multiple creditors and with the answers to Questions 1 and 18 above in mind, there are two procedures that may be summarized as follows.

The distribution of proceeds procedure (“*procédure de distribution des deniers*”) shares the proceeds of sale of attached movable assets among unsecured creditors, and in some cases immovable assets, depending on the respective amount of their debts against the debtor (1991 Statute, Article 38, and 1992 Statute, Articles 283 to 293).

The share of proceeds of sale of a real property among the creditors is submitted to specific procedures which have been recently reformed and are now regulated by the Order n°2006-461 of April 21, 2006 and the Decree 2006-936 of July 27, 2006.

20. What is the procedure for challenging or vacating an order of attachment?

An order of attachment may be challenged by the debtor at any time, in particular when the conditions for attachment were not satisfied from the start (please see Questions 5 and 6 above). The debtor may also give a guarantee, which will enable the debtor to obtain the discharge of the attachment of his assets (see Question 6 above).

21. If there are any other aspects of attachment of law that have not been addressed in the questions, please discuss them here, or elsewhere, as appropriate.

As mentioned above, this questionnaire discusses mainly the general conditions applicable to conservatory measures. However, certain assets are governed by specific regulations, such as road motor vehicles and assets located in the debtor’s bank safe. Furthermore, the attachment of aircraft and ships is governed by specific legislation whereas certain rules of the 1991 Statute and 1992 Decree may be applicable when an issue is not covered by the specific legislation.

Also, certain execution measures, in particular when the creditor wants to attach his own assets detained by a third party, are of a conservatory nature during a first phase and later converted into proper execution measures.