



EURAVOCAT LAW HANDBOOK

# DEBT COLLECTION IN SWITZERLAND

From our member in Geneva



## 1. General Information

Under Swiss law, the enforcement procedure to recover debts of money is governed by the Swiss Federal Act on Debt Enforcement and Bankruptcy (“DEBA”).

The originality of the Swiss system lies in the possibility of lodging a compulsory enforcement request, known as a summons to pay, before the claim has been judicially verified.

The Debt Collection Office (hereinafter: the "Office"), a state body whose activities are subject to specific judicial control, responds to the creditor's request regardless of whether the claim exists or not. It is up to the debtor to contest the claim by lodging an objection.

The debtor is still sufficiently protected, since a simple declaration on his/her part will prevent the proceedings from continuing. However, if the debtor does not react, the proceedings move on to the second phase, which is the seizure of the debtor's assets.

Moreover, Swiss law differentiates between two systems and divides debtors into two categories:

- Commercial debtors, i.e. those entered in the Commercial Register. They are generally subject to bankruptcy (see *infra* IV. B) (Art. 39 DEBA); or
- Non-commercial debtors, i.e. all other types of debtors. They are generally subject to seizure (see *infra* IV. A) (Art. 42 DEBA).

In both systems, the start of the procedure is similar (see *infra* III).

## 2. Amicable Collections

Usually, before starting an enforcement procedure, the creditor tries to recover his/her claims through amicable actions (e.g. emails, phone calls, formal notice etc.). If these steps are unsuccessful, then the creditor generally turns to debt collection procedures.

### A - Interest

In the absence of an express mention in a contract or in a specific legal provision, default interest is 5% per annum (Art. 104 Paras 1 and 2 of the Swiss Code of Obligations (“CO”)).

However, the opening of the bankruptcy proceedings stops the accrual of interest (Art. 209 Para. 1 DEBA).

### B - Debt Collections Costs

The debtor shall bear the costs of the proceedings. However, the creditor is obliged to advance the costs of enforcement, which are requested from time to time by the Office and which are proportionate to the value of the claim (Art. 68 DEBA).

The creditor must also advance the costs of the mainlevée proceedings. If the judge accepts the mainlevée, the court will then charge the debtor with all the enforcement and court costs advanced by the creditor.

As regards to lawyers' fees, these can only be recovered to a very limited extent for legal actions such as the mainlevée proceedings, but not for the legal activity carried out before the Office.

### C - Limitation Period

All claims are time-barred after ten years unless otherwise provided by federal civil law (Art. 127 CO). As for example, in debt collection matters, a claim established by a certificate of loss is time-barred after 20 years from the date of issue of the certificate of loss (Art. 149a Para. 1 and 265 Para. 2 DEBA).

The limitation period begins as soon as the claim becomes due and payable (Art. 130 Para. 1 CO). The limitation period is interrupted by, inter alia, debt enforcement proceedings. This interruption triggers a new limitation period of ten years. For example, the commencement of proceedings interrupts the limitation period (Art. 135 No. 2 CO).

## 3. Legal Collections

The debt collection procedure is almost always initiated at the debtor's domicile/registered office. This is known as the place of enforcement. It must be distinguished from the place of jurisdiction, which determines the judge's competence for the material judicial decisions (Art. 46 et seq. DEBA).

All debt collection procedures must start with a request for debt collection from the creditor to the Office. This request must contain certain information, such as the name and address of the debtor, the value of the debt, the reason for the debt and the interest due. The value of the debt must be stated in Swiss francs, even if it is actually expressed in a foreign currency, otherwise it will be inadmissible (Art. 67 Para. 1 No. 3 DEBA).

Based on the information contained in the request for debt collection, the Office issues a summons to pay and notifies it to the debtor. The summons to pay contains two alternatives for the debtor (Art. 69 DEBA):

- To pay the amount claimed within twenty days; or
- To lodge an objection within ten days.

Notification is a special procedure that requires the document to be delivered open-handed to the person concerned or their representative (e.g. an employee or an adult in their household).

The debtor may lodge an objection to the summons to pay (Art. 74 DEBA). This is a declaration of opposition to the continuation of the proceedings. It is sufficient to declare the opposition to the notifying agent or to send it to the Office verbally or in writing within the deadline of ten days after the notification of the summons to pay. The debtor is not required to justify his/her objection.

Objection to the summons to pay has the effect of suspending the debt collection proceedings (Art. 78 DEBA). The creditor therefore has several alternatives:

- To file an action for a recognition of debt if he/she does not have a *mainlevée* title (Art. 79 DEBA). The creditor will then have to take action through the ordinary procedure;
- To apply for a *mainlevée définitive* of the opposition in summary proceedings if the creditor has an enforceable judgment (or a title assimilated to an enforceable judgment) (Art. 80 DEBA); or
- To apply for a *mainlevée provisoire* in summary proceedings if the debtor has signed an acknowledgement of debt which is a declaration of willingness by the debtor to pay the creditor a definite or easily determinable sum of money without reservation or condition (Art. 82 DEBA). If the *mainlevée provisoire* is granted, the debtor may bring an action to discharge a debt within twenty days of the *mainlevée provisoire* (Art. 83 Para. 2 DEBA). An action to discharge a debt is an action to establish that the debt does not exist or is not eligible for payment.

As soon as the summons to pay has come into force (as a result of a *mainlevée* or an absence of opposition), the creditor may submit a request for continuation (Art. 88 DEBA). It is at this point that

the Office decides whether to proceed with the seizure or the bankruptcy proceedings.

## 4. Insolvency Proceedings

Swiss system differentiates two systems depending of the debtor (see supra I), i.e. the seizure proceedings (see infra A) and the bankruptcy proceedings (see infra B).

### A - Seizure Proceedings

Once the request to continue the proceedings by the creditor has been received, the Office seizes the debtor's assets. The debtor remains the owner of the seized assets but cannot dispose of them (Art. 96 DEBA). Some assets, such as state old-age pensions, cannot be seized (Art. 92 DEBA). The Office must also respect the subsistence minimum of the debtor and his/her family (Art. 93 DEBA).

Other creditors may participate in the seizure of the debtor. However, they will be allocated according to a system of series depending on when they require the continuation of the proceedings against the debtor (Art. 110 and 111 DEBA).

The series system prioritises the payment of the claims of different creditors. Those in the first series will therefore be paid first.

The next stage is the realisation of the seized assets. Realisation must be requested by the creditor (Art. 116 DEBA). Realisation is carried out by public auction, subject to extraordinary methods of realisation (Art. 125 DEBA).

If the proceeds of realisation are sufficient to pay off the creditors in full, the seizure proceedings are discontinued.

If this is not the case, the Office proceeds to the seizure of new assets. If there are no new assets to seize, the Office draws up a list of creditors to distribute the proceeds among the creditors. Creditors are divided into three classes, according to their status and the nature of their claim (Art. 146 and 219 DEBA). The first class will be paid first and so on.

Creditors who have not been fully satisfied by the realisation of the assets are issued with a certificate of loss. A certificate of loss is equivalent to an acknowledgement of debt, which makes it possible to obtain a *mainlevée provisoire* (Art. 149 DEBA)

A claim established by a certificate of loss does not bear interest (Art. 149 Para. 4 DEBA).

### *B - Bankruptcy Proceedings*

Once the request to continue the proceedings has been received, the Office issues a compulsory notice of pending bankruptcy to the debtor.



Such notice informs the debtor that if he/she does not pay within a final time limit of twenty days, the creditor shall be able to request to the competent bankruptcy court that the company be declared bankrupt (Art. 160 DEBA). It is important to note that a company can only be declared bankrupt by a court decision.

Once the notice of pending bankruptcy has been issued, the creditor must apply to the judge for bankruptcy to be opened through a summary proceeding.

Once the bankruptcy has been opened, the Office records an inventory of the value of all the assets and estimates their market value (Art. 221 and 226 DEBA). The call for creditors is published in the Official Gazette of the canton, as well as in the Swiss Official Gazette of Commerce. Creditors are invited to submit their claims to the Bankruptcy Office within thirty days (Art. 232 DEBA). Claims are determined in the list of creditors, which divides creditors into three classes according to their status and the nature of their claim (Art. 219 DEBA) (see supra IV.A).

Assets are generally realised by public auction, subject to extraordinary methods of realisation (Art. 256 Para. 1 DEBA).

Once the realisation of assets is over, the Office distributes the assets according to the classes of the list of creditors (Art. 264 DEBA).

Any creditor who has not been paid in full receives a certificate of loss for the unpaid amount (Art. 265 DEBA) (see supra IV.A).

After distribution, the Office submits a final report to the judge who declared the bankruptcy. The judge then declares the bankruptcy closed after noting that the liquidation has been completed (Art. 268 DEBA).

### C - The freezing order

A freezing order is an official seizure of certain assets of the debtor with a view to their later realisation by way of seizure or bankruptcy. To be effective, the freezing order must be carried out suddenly and without warning to the debtor.

In addition, the freezing order is only justified in certain specific circumstances.

In order to obtain freezing order, the creditor must prove the following elements (Art. 271 and 272 DEBA)

- The existence of a claim that is due and not secured by a pledge (Art. 272 al. 1 No.1 DEBA);
- The existence of a case of a freezing order pursuant to art. 271 DEBA (Art. 272 al. 1 No. 2 DEBA), i.e. only the following cases :
  - The debtor has no fixed residence (either in Switzerland or abroad) (Para. 1);
  - The debtor disappears, gets away or intends to get away with the intention of evading his/her obligations (Para. 2);

- When the debtor is passing through or falls into the category of people who frequent fairs and markets, if the debt is by its nature immediately due and payable (Para. 3);
  - If the debtor does not live in Switzerland and there is no other case of a freezing order, provided that the claim has a sufficient connection with Switzerland or is based on an acknowledgement of debt within the meaning of Art. 82 para. 1 DEBA (Para. 4);
  - If the creditor has a provisional or definitive certificate of loss against the debtor (Para. 5);
  - If the creditor has a *mainlevée définitive* against the debtor (see supra III) (Para. 6). This case of sequestration applies to any definitive release, even outside the scope of the Lugano Convention.
- The existence of assets belonging to the debtor in the freezing order forum (in Switzerland) (Art. 272 Para. 1 No. 3 DEBA).

The freezing order authority instructs the Debt Collection Office to carry out the order, which must comply with the formalities required for seizure (Art. 275 DEBA in conjunction with Art. 91 to 109 DEBA), in particular not to seize the debtor's assets that are not seizable (see supra IV A).

### *i. Effects of the freezing order*

For the debtor, the effects of the freezing order are the same as those of seizure, i.e. the debtor remains the owner of the seized assets but cannot dispose of them.

For the creditor, a freezing order provides security for future proceedings. The seized assets can be realised in subsequent legal proceedings.

### *ii. Validation of freezing order*

Since a freezing order only guarantees an action, it must be followed by an enforcement procedure, otherwise it is null and void (Art. 280 DEBA). There are two possible scenarios:

In the absence of any prior legal proceedings or action, the creditor must request legal proceedings or bring an action within ten days upon receipt of the official report (Art. 279 Para. 1 DEBA). If there is an objection (see below), he must apply for a *mainlevée* within ten days (Art. 279 Para. 2 and 3 DEBA); or

If a lawsuit or legal action is already pending at the time of the execution of the freezing order, the creditor is exempted from filing a new lawsuit, provided that the freezing order relates to the claim for which the attachment was executed.

### *iii. Objections by the debtor*

The debtor may lodge an objection with the judge who issued the freezing order within ten days (Art. 278 DEBA).

It is important to note that this is not an appeal, but a procedure that allows the judge to reconsider his/her order after hearing all interested parties.

Moreover, the opposition procedure does not suspend the effects of the freezing order.

### D - The Composition

Although the arrangement procedure is open to any natural or legal person (Art. 293 Lit. a DEBA), it is more suitable for companies than for individuals, as it is a cumbersome and costly procedure.

In general, the procedure is initiated by a request from the debtor. However, creditors who are in a position to file for bankruptcy may also request the opening of composition proceedings (Art. 293 Lit. b DEBA).

As soon as the request is filed, the court immediately grants a provisional suspension of enforcement for a maximum period of 4 months (Art. 293a Para. 2 DEBA). However, it will automatically declare bankruptcy if the composition proceedings appear to be doomed to fail (Art. 293a Para. 3 DEBA).

If, during the provisional suspension, there is a prospect of reorganisation or of the approval of a composition, the judge will grant a definitive suspension of four to six months (Art. 294 Para. 1 DEBA).

The judge then appoints a commissioner whose duties include drawing up an inventory of the company's assets and liabilities and submitting a report to the judge. The commissioner may also assist in drawing up a draft composition agreement (Art. 295 DEBA).

*i. Approval of the composition*

No composition may be approved unless it has first been accepted by a majority of the creditors. The DEBA alternatively provides for two double majorities (Art. 305 DEBA):

A simple majority of creditors representing at least two thirds of the claims;

One quarter of the creditors representing at least three quarters of the claims.

Once the majority of creditors have given their consent, the composition cannot be imposed on all creditors unless it is approved by the judge ("homologation"). In order to be approved, the composition must fulfil the following conditions (Art. 305 DEBA):

The amount offered as a composition dividend to the creditors must be proportionate to the debtor's means; and

The full payment of the recognised preferential creditors and the fulfilment of the obligations entered into during the suspension of payments with the consent of the commissioner must be

sufficiently secured, unless each creditor has expressly waived the right to demand security for his own claim.

*ii. Effects of the authorisation*

All claims that arose before the granting of the definitive suspension or during the composition proceedings without the consent of the commissioner are subject to the composition, i.e. they are reduced to the composition dividend.

Claims arising during the composition proceedings with the commissioner's consent may be repaid in full.

Finally, all debt collection proceedings initiated before the definitive suspension are extinguished, with the exception of proceedings for the realisation of pledges.

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*This debt collection guide is provided for general informational purposes only. Any information contained herein should not be construed as legal advice and is not intended to be a substitute for legal counsel on any subject matter.*

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*About Switzerland*