International Asset Sequestration

Achieving effective judgment awards

Virtual Round Table Series
Private Client Working Group 2018

International Asset Sequestration

Achieving effective judgment awards

The process of recovering debts can be extremely challenging, particularly when the individual debtor in question is sophisticated, and holds assets in multiple jurisdictions around the world.

The legal process of asset sequestration, or seizure, differs markedly depending on which country or legal system is governing the courts in question. There are powerful tools available to help to locate, freeze and recover international assets from a judgment debtor, which can be utilised before a judgment has been won, but there are tough standards.

These tools are referred to differently according to jurisdiction and are called, variously, pre-judgment attachment orders, pre-trial seizure orders and precautionary garnishee orders.

Understanding the requirements to gain access to these legal options is key, and for that, local expertise is required. In Florida, for instance, the standards are equivalent to clear and convincing evidence of fraud, while in the civil law jurisdictions of Portugal and Italy, the legal concepts of *Periculum in mora* and *Fumus boni iuris* must be satisfied before a pre-judgment order can be gained against a problem debtor.

Once access to these localised systems of sequestration has been secured, the task of recovering international assets becomes much easier. In some jurisdictions, the powers granted are significant, such as in the Dominican Republic, for example. A plaintiff creditor can attend a debtor's bank with a pre-judgment order and have his assets immediately frozen, since the country's financial system operates on the principle of *prima facie* non-judgment of embargo claims.

Plaintiffs may have to pay substantial refundable deposits to the court in question in order to enable sequestration, as is the case in Taiwan, but this seems a fair price to pay for the ability to trace, freeze and eventually seize assets in payment of debt. In China, this requirement for a deposit can be avoided, by utilising a guarantee company, who will satisfy the bond requirement for a small percentage of the eventual claim.

If there are concerns about the ability of the debtor to relocate, sell or hide assets prior to judgment, then pre-judgment attachment orders can be applied for anonymously in certain circumstances, making it more difficult for debtors to escape justice. The ways and means of achieving this in different parts of the world are discussed in more detail below and do, again, rely on intimate knowledge of the legal systems in question.

The following discussion is designed to provide a good understanding of international debt recovery, as applicable to personal assets. It details an interesting cross-section of jurisdictions and the various options available to aid asset recovery in each country. The most important point to take away though, must be the importance of engaging local legal expertise in the process from an early stage, to ensure efficient navigation of the legal system and full utilisation of the most powerful sequestration tools available.

The feature includes commentary from IR Global members in the US – Florida, Portugal, China, Taiwan, Italy, Luxembourg, Switzerland, Malta, Brazil and the Dominican Republic.

The View from IR

Ross Nicholls

BUSINESS DEVELOPMENT DIRECTOR

Our Virtual Series publications bring together a number of the network's members to discuss a different practice area-related topic. The participants share their expertise and offer a unique perspective from the jurisdiction they operate in.

This initiative highlights the emphasis we place on collaboration within the IR Global community and the need for effective knowledge sharing.

Each discussion features just one representative per jurisdiction, with the subject matter chosen by the steering committee of the relevant working group. The goal is to provide insight into challenges and opportunities identified by specialist practitioners.

We firmly believe the power of a global network comes from sharing ideas and expertise, enabling our members to better serve their clients' international needs.

US – FLORIDA

Harry A. Payton

Founder, Payton & Associates

1 305 372 3500 x115

payton@payton-law.com

Harry is one of 88 lawyers in the state of Florida with dual board certification in civil trial and business litigation. Harry represents domestic and international corporations and high net worth individuals in complex business litigation matters

In 2012, Harry was appointed to the Professionalism Committee for the 11th Judicial Circuit, and chairs the mentoring program subcommittee. He is a member of the Florida Bar Section of Business Law; and the Florida Bar Section of Entertainment, Arts and Sports Law.

He is currently serving a second term on The Florida Bar Judicial Nominating Procedures Committee.

TAIWAN

Juan Carlos Madrigal

Consultant, Pamir Law Group

886 2 5588 1766

jmadrigal@pamirlaw.com

Juan Carlos divides his time between Taipei and Shanghai, providing strategic advice and practical operational support to U.S., European and Latin American clients in market entry and expansion activities, cross-cultural commercial negotiations, strategic partner selection, business dispute mediation, corruption investigations, background checks, and M&A transactions in China and Taiwan.

Juan's multi-cultural background, business acumen and deep understanding of global market trends and the local business environment in Greater China allow him to effectively bridge language, cultural, and business mentality gaps commonly encountered by foreign and Chinese investors during business negotiations and disputes. He is adept at developing win-win scenarios in complex situations by addressing all business and legal issues while catering to the cultural sensitivities and personality types of all decision makers in the room.

Juan holds an International MBA from National Chengchi University, Taipei and a B.S. with Honours in Information Systems Engineering from Universidad Latinoamericana de Ciencia y Tecnología in San José, Costa Rica.

ITALY

Ruggero Rubino Sammartano

Partner, LawFed BRSA

39 02 7707 5500
ruggero.rubino.brsa@lawfed.com

Ruggero Rubino Sammartano is partner of LawFed BRSA, a mid-size commercial firm with more than 50 years of experience in trans-border transactions and litigations. He has a wealth of experience thanks to time spent working at international law firms in London, New York, Paris and Munich.

His practice is focused on corporate and company law mainly for foreign clients, by supporting their business in Italy. With his team he advises them in the day-to-day operations, as well as in extraordinary transactions, such as M&A, or purchase and sale of businesses.

He builds strong ties with his clients lasting over the years, which makes him an important interface for the foreign shareholders.

Ruggero speaks in English, French, German and Spanish in addition to Italian. This helps him to quickly dive into the different cultures that he regularly works with.

He had lectured at legal conferences and written extensively in the field of arbitration and mediation.

PORTUGAL

Filipa Godinho

Paralegal, Valadas Coriel & Associados

351 213 460 106
filipa.godinho@valadascoriel.com

Filipa Godinho has been a trainee lawyer at Valadas Coriel e Associados since September 2017, working across various areas such as, commercial, corporate, tax, emigration and litigation.

Filipa also works with international projects being a member of VCA's Africa Team. She graduated in Law at the Faculty of Law, University of Lisbon, in 2015, and is currently finishing a Master in International Law and International Relations at the Faculty of Law, University of Lisbon, and a postgraduate course at the Faculty of Law, University of Coimbra.

SWITZERLAND

Peter Ruggle

Managing Partner, Ruggle Partner

41 43 244 82 22

peter.ruggle@rugglepartner.ch

Peter Ruggle has worked in the Zurich legal sector, since 1988. He acted as legal secretary to the Chairman of the Arbitration Board, Judge at District Court Meilen, between 1994-1998, before passing the bar exam of the Canton of Zurich in 1998.

His specialist practice areas include corporate and commercial law, corporate finance, banking and financial market law, mergers and acquisitions, litigation and arbitration and mediation.

He has contributed to a number of publications, including the Basel Commentary on the Swiss Code of Civil Procedure, Basel 2013, and the IBA e-book of Mediation Techniques, London 2010 (Patricia Barclay, ed.), Confidentiality in Mediation - the Civil Law Tradition.

Other contributions include the titles Cash Management under Swiss Law, French Association of Cash Managers (AFTE) 2003, and A Technical Guide on Centralized Cash Management in Europe, published by the European Association of Corporate Treasurers (EACT) (Co-Author), Paris September 2004.

He is a member of the Zurich Bar Association, the Swiss Bar Association and the Swiss Arbitration Association (ASA). He speaks German, English and French.

LUXEMBOURG

Roy Reding

Partner, Reding Legal

352 269 272 1

roy.reding@reding.lu

Roy Reding joined the Luxembourg bar in 1990, after obtaining his 'master in business law' from the University of Strasbourg – France. His first experience as in-house lawyer was with the Banque Generale Du Luxembourg SA.

In 1993, he established his own law firm (Reding & Felten), concentrating on litigation, real estate and family office activities since 2003. He acted for many years as a 'Justice of the Peace' and became a member of the Luxembourg Parliament in 2013.

Reding Law Firm focuses on advising and solving problematic situations, be it by avoiding cases before they come to court, or defending clients in front of all types of courts in Luxembourg regarding civil, commercial or administrative law.

MALTA

Veronique Dalli

Partner, Dalli Advocates Law Firm

356 27133681
veronique@dalliadvocates.com

Veronique Dalli is the founder and managing partner of Dalli Advocates, a mid-sized multi-disciplinary law firm specialised in assisting companies and individuals in business-related matters with interdisciplinary services.

She was admitted to the Maltese bar in 2006, for the past 12 years she has defended her clients successfully both before the Constitutional Court and the Superior Courts in Malta, as well as before the European Court of Human Rights in Strasbourg.

Together with her team of professionals, she actively assists foreign investors on all legal issues relating to the setting up of business operations in Malta and is an accredited agent on the Citizenship by Investment Program in Malta.

She is also specialised in the new blockchain and cryptocurrency legislation in Malta and acts as legal Counsel to the Malta Gaming Authority and one of the main media houses in Malta.

Veronique has spoken at a number of international conferences on issues relating to company law, blockchain and token classifications, as well as regulatory license regimes.

Veronique obtained her first degree from the University of Malta in the year 2002 and furthered her studies to obtain a Diploma as Notary Public in the year 2003 and a Doctor of Laws in the year 2005.

BRAZIL

Paulo Sergio Ferraz de Camargo

Partner, Ferraz de Camargo and Bugelli Lawyers

55 11 3074 2222
pcamargo@ferraznet.com.br

Paulo is managing partner at Ferraz de Camargo and Bugelli Lawyers in São Paulo, Brazil.

He is responsible for civil litigation, both labour and contractual, within the firm and has more than 20 years' experience in the practice of law, taking an active part in the globalisation, consolidation and development of the Brazilian economy.

Paulo has a Master in Law from PUC (SP), producing a dissertation on the collective moral damage is a possibility of application of punitive damages (punitive damages) in 2011.

He has been a specialist in civil procedure at COGEAE PUC / SP since 2002 and graduated from the Catholic University of São Paulo (PUC) in 1999. He is Vice President of OAB Pines and speaks English as well as Portuguese.

CHINA

Jian Zhang

Attorney, Pamir Law Group

86 21 5256 9933

jzhang@pamirlaw.com

Jian Zhang is a China-licensed lawyer based in the Shanghai office of Pamir Law Group.

He leads the firm's international team which provides support on a full range of corporate, regulatory and immigration matters for multi-national clients, both companies and professional firms.

Jian is actively engaged in legislative consultation for the Shanghai Municipal Council and has a long track record of working not only in leading law firms but also in-house and with government agencies. He aims to provide practical solutions for international clients in China.

He is a member of the Administration Law Committee of the Shanghai Bar Association and is in active engagement in legislation consultation for the Shanghai Municipal Council.

He was educated at the University of Nottingham and the East China University of Politics and Law.

DOMINICAN REPUBLIC

Pablo Gonzalez

Founding Partner, González Tapia Abogados

1 809 475 8860

pgonzalez@gonzaleztapia.com

González Tapia is managing partner at Gonzalez Tapia Abogados in the Dominican Republic.

He began his practice at the firm Messina & Messina (currently Biaggi & Messina), as Associate Attorney. Later in his career he became partner of the firm. In 2009, he decided, along with a team of prepared and recognised professionals, to fund the firm González & Coiscou. After acquiring vast practical experience in management and administration, he decided to embark on his next business undertaking in 2014, opening his own law firm - Gonzalez Tapia Abogados.

He has more than 23 years of experience in the practice of Litigation and Corporate and Business Law, representing several clients in major court and arbitration cases as well as in international negotiations.

González took joint responsibility for the negotiation team in the privatisation of five international airports in the Dominican Republic and was the lead attorney in the multimillionaire litigation of a Swiss corporation, well-known in the Dominican Republic and other foreign jurisdictions as Spain, Panama and the United States.

QUESTION 1

Does the legal system in your jurisdiction provide for the sequestration of assets before a judgment is entered and, if it does, what are the circumstances under which a sequestration order would be entered?

USA – Harry Payton (HP) In the USA each of the states has its own organic law, so I will be talking specifically about Florida law. To a large extent, Florida follows the English Common Law system, which is the background to the majority of applicable law in the US.

In connection with sequestration of assets prior to the entering of a judgment, the evidence that will entitle an applicant to that form of relief must be very strong. Our statutes permit a replevin and an attachment, but the standards are tantamount to proving fraud by clear and convincing evidence.

A defendant concealing themselves or their assets, or transferring assets for less than fair value are all signs of fraud, and, if proven, will entitle the plaintiff to a pre-judgment garnishment or replevin. There is, however, a notice of hearing that is required.

In summary, Florida does have the mechanisms available for pre-judgment sequestration, but proof must be very high and, in some cases, there is a bond that is required.

China – Jian Zhang (JZ) In China, we also have pre-judgment sequestration procedures. For every request, you need to first of all provide evidence that you have a case and then place a bond in court of 30 per cent of the value of the disputed or sequestered amount.

You can use a local guarantee company, for a fee of 1 per cent of the value you want to seize. Use of a guarantee company satisfies the bond requirement.

Normally when we file the case, we should present all the evidence at the end. At the same time, we ask the court's permission to grant a sequester order so that the defendant is not judgment proof.

Taiwan – Juan Madrigal (JM) In Taiwan, a plaintiff is able to petition for the pre-judgment attachment of a defendant's bank accounts and other assets. This can be done before a lawsuit is filed, on condition that the plaintiff is able to show a strong case.

When petitioning for pre-judgment attachment, a plaintiff needs to prove that it would be impossible or extremely difficult to collect the claimed amount from the defendant.

Even though it's a two-step process, we recommend you file a petition and a lawsuit at the same time. When not filed together, the court will, upon motion of the defendant, order the plaintiff to file a lawsuit in Taiwan to validate its claim within a certain period (usually 7 days) after the assets are attached. The plaintiff's failure to institute the litigation against the defendant within the prescribed period will result in the lifting of the pre-judgment attachment.

There is no such concept as fraudulent conveyance in Taiwan, so the defendant is free to move their assets until a judgment is obtained, or a pre-judgment attachment is granted. This means any sequestration must be applied for at the earliest opportunity.

The plaintiff is also required to pay a bond, which can range from 30 – 100 per cent of the claim, at the discretion of the judge but is usually 33 per cent of the claim. This can be paid in the form of cash or a certificate of deposit (CD). It will be deposited with the court and will only be refunded to the plaintiff in specific circumstances.

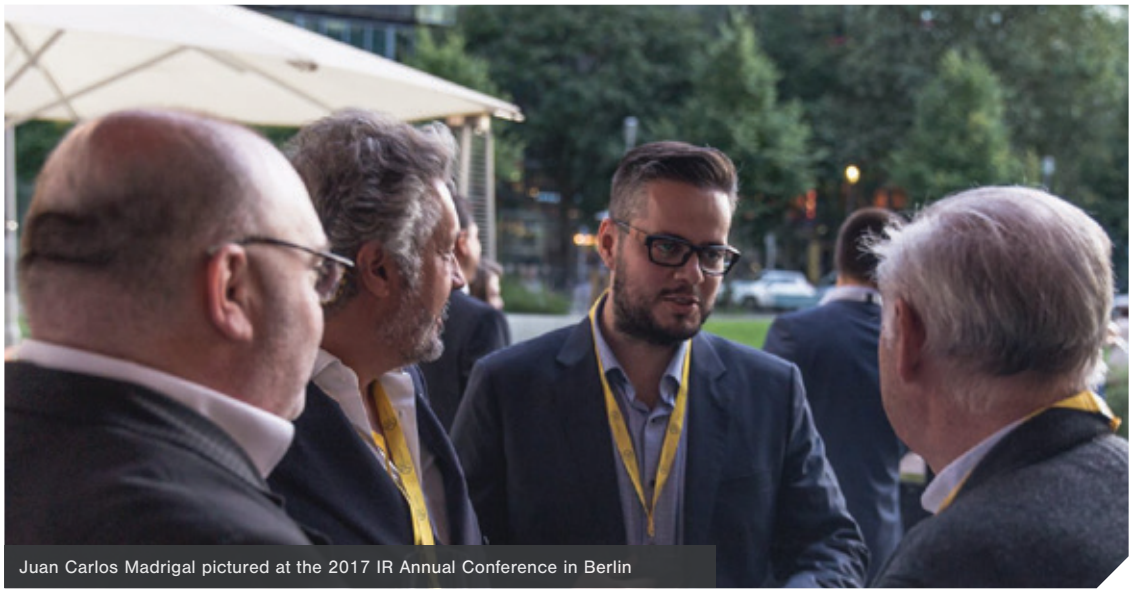
In addition to the bond, the plaintiff must pay an execution fee equivalent to 0.8 per cent of the claim amount.

Luxembourg – Roy Reding (RR) In Luxembourg we have a rather simple procedure, which involves obtaining a seizure or attachment order (*saisie arrêt*) from the President of Court. This can relate to bank accounts or receivables. This is a unilateral procedure and there has to be an unquestionable, liquid and due claim.

We do not recognise court or tribunal costs in Luxembourg, since access to justice is free. The claimant does have to cover his lawyer's fees and the bailiff's costs though to serve the court order upon the third party and the debtor.

The seizure order can be obtained before a judgment was received or even asked for, but it will only be validated if a judgment is obtained. (*validation de la saisie arrêt*). The seized assets or receivables cannot be dissipated and must remain frozen.

It is of no consequence to the seizure if the debtor is present, abroad or disappeared. It might, however, be a procedural problem to validate the seizure if the debtor is residing in a country where serving a court order or a judgment is difficult.



Juan Carlos Madrigal pictured at the 2017 IR Annual Conference in Berlin

In mortgage cases, Luxembourg law does allow the sale of a mortgaged piece of real estate as soon as a mortgage (*hypothèque*) is inscribed, but the money must be distributed to the inscribed creditors. If the selling price is insufficient to pay all the inscribed debt, and one or more creditors refuse to lift their mortgage (because they deem the price too low), then a special procedure requires the buyer to notify all the inscribed creditors, who can then force a public sale by bidding 10 per cent more than the initial selling price. This is known as a purge. Civil law does allow for the asset to be sold in a public auction, in which case the purge is automatic.

We also have the ability to attach wages and salaries under a special procedure.

Italy – Ruggero Rubino Sammartano (RRS) There are two kinds of seizures in Italy. The first is the judicial seizure, concerning assets with disputed ownership where temporary custody is appropriate. The second is the conservative seizure which concerns assets to be kept on hold due to a well-founded risk of loss of credit guarantee.

In Italy two conditions are to be satisfied before a seizure order is granted, which are;

Periculum in mora – i.e. a serious and irreparable harm which would be caused by not granting the order.

Fumus boni iuris – i.e. that the application is *prima facie* grounded.

If either of these requirements remains unsatisfied, the seizure order will not be granted.

It may be useful to present the balance between the positive outcome of a seizure order and the negative side of it. If there is a balance in favour of granting it, the judge will be inclined to grant it.

In addition to this, there are two possible applications – one for pre-trial seizure order granted *inaudita altera parte* (i.e. without hearing the other party) and the other for the granting of the order only after hearing both parties. The threshold is much higher in the first case.

Usually the court does not require a bond to grant a seizure, although security may be offered by the debtor for the full amount of the claim and costs, to remove the seizure order.

These orders are a very important tool, used, for example, if there is a risk that the defendant may try to make his assets disappear, or that they flee the jurisdiction. The seizure of the debtor's assets may be made even if they are held by a third party.

Malta – Veronique Dalli (VD) Seizing monies, movable property and other assets is possible prior to the delivery of a judgment via what are known as precautionary garnishee orders and precautionary warrants of seizure. These precautionary measures are designed to safeguard the creditor's claim by preventing the dissipation, disposal, transfer or concealment of assets prior to a final judgment.

The garnishee order operates by seizing monies or movable property belonging to the debtor, but in possession of a third party (typically a commercial bank), who is duty-bound to physically deposit them in court. The warrant of seizure, on the other hand, entails a court executing officer physically taking items from the possession of the defendant for the purpose of selling them by court auction in the event of a favourable judgment.

Ruggero Rubino Sammartano pictured at the 2017 IR Annual Conference in Berlin

Precautionary measures can be requested to safeguard any claim, including unquantified damages arising from personal injury or libel. Plaintiffs need simply file a sworn application in court setting out the full amount owed and the nature and origin of the claim. Their issuance is virtually automatic: there is no hearing, and no lines of defence are possible except antecedent to the order. However, a fully-fledged lawsuit must be instituted by the creditor no later than 20 days from the order of the precautionary measure.

Precautionary measures remain in force until the final determination of the cause, upon which they achieve executive status in the event of a favourable outcome for the creditor. They can only be rescinded or revoked in limited circumstances that include the defendant proving that the amount claimed is *prima facie* not justified or is excessive, or alternatively by making a deposit or giving security that is sufficient to safeguard the rights or claims of the alleged creditor.

Portugal – Filipa Godinho (FG) Portugal is similar to Italy and other Latin countries. Our jurisdiction provides for several protective orders which all depend on satisfying the same principles of *periculum in mora and fumus boni iuris*, or evidence of your right and danger in waiting.

The most effective is arrest (*arresto*) which applies to buildings, land, ships and other immovable assets. For bank accounts, shares, bonds and all sorts of financial instrument the order is called 'arrolamento' and mainly consist in the dispossession of the owner, the assets being normally put under custody of a fiduciary.

For safes, art work, furniture, merchandise, cars and other valuable but movable assets you can ask the court to apprehend and remove them to a deposit under the custody of a bailiff (*agente de execução*).

You shall have to demonstrate perfunctorily that the credit exists and that you a have reason to believe that the creditor is concealing, selling or otherwise diminishing the value of the assets.

If the evidence is sufficient, the court will grant the protective order without even hearing the defendant. If the court is not fully convinced either by documents or by testimonial of the *periculum in mora*, it shall hear the other party.

Concerning the arrest (*arresto*), this type of protective order is always granted without hearing the other party, while all the other protective orders might be granted with or without hearing the other party.

The protective order is granted without hearing the other party, who will only be notified after the sequestration and will have the right to oppose in a court hearing or directly appeal the decision.

In some cases, whenever facts and law are clear and uncontroverted, the protective order can become a permanent decision on merits. This is called *inversão do contencioso*.

In Portugal, such protective orders are considered urgent and have precedence above all other claims in the judicial service.

Finally, the protective orders can also be asked for during an ongoing proceeding as interim measures if the same perils are demonstrated. In this case the creditor might ask for secrecy until the order is granted to guarantee that the debtor

doesn't accelerate the plan to conceal or dispose of the assets necessary to guarantee payment.

Brazil – Paulo Sergio Ferraz de Camargo (PC) In Brazil it is possible to sequester assets prior to a judgment, using a preparatory law suit. This is faster than a normal lawsuit, but you need to prove you have a credit against the defendant and also that the defendant is dissipating, transferring or concealing assets. If you can prove this, you can start a lawsuit and try to reserve these assets for your collection suit.

At the start of the collection suit, if you know that the defendant has real estate assets, you can request a special stamp and use it at the registration of real estate to show you have a collection suit against the owner. If you are the first company to do that, then you have preferential status as a creditor when the asset is sold. This is a form of sequestration that can take place at the beginning of the process, before the defendant presents his defence.

Dominican Republic – Pablo Gonzalez (PG) Dominican Republic follows the Civil Code, so we follow French rules, but the standards are similar to other jurisdictions.

When the creditor believes the debtor is concealing assets, or is in danger of becoming insolvent, the creditor can ask the judge to authorise an order of embargo to seize assets, or a judicial mortgage if you are trying to seize real estate.

The request is made without the other party being present, and the judge will have to look at whether the creditor has given the debtor an opportunity to pay before proceeding with the judicial process. The creditor must provide evidence that the payment is in danger. The judge also has the authority or discretion to impose a bond or a guarantee on the creditor in order to enforce the request, but in reality that is very rare.

Once an embargo is placed on the assets, they remain in the hands of the debtor, but he cannot move or sell them. Once the embargo is in place, the creditor has to go to the courts of law to validate the process.

We have a useful tool for liquid assets in Dominican Republic, which allows the creditor to go with a title and invoice to the debtor's bank and tell them to freeze the debtor's assets. The bank relies on the principle of not judging the validity of the embargo in the first instance.

This has been a good tool for creditors and a real problem for debtors in the Dominican Republic.

Switzerland – Peter Ruggle (PR) Interim relief can be sought before a procedure begins, or at any later stage during the proceedings. If, prior to lis pendens, the court sets a deadline for the plaintiff to file suit.

Swiss law distinguishes between interim relief measures aimed at securing monetary claims, and measures dealing with non-monetary matters.

Monetary claims may be secured by applying for a freezing order under the Federal Debt Enforcement and Bankruptcy Act. Creditors must show to the court that they have outstanding debts against the debtor and existing statutory grounds for a freezing order. They must also prove the existence of assets and their location, if in Switzerland.

A freezing order can be sought if the debtor has no permanent residence in Switzerland, or is attempting to conceal assets or planning to leave Switzerland. One can also be sought if the debtor is travelling through Switzerland, or conducting business at trade fairs, providing that the claim is settled immediately.

If none of these circumstances apply, the freezing order may still be granted if the claim has sufficient connection with Switzerland or is based on a clear recognition of debt. The creditor must hold a provisional or definitive certificate of shortfall against the debtor, or a definitive enforceable title permitting them to have any objection by the debtor set aside (*definitiver Rechtsöffnungstitel*).

In all these situations, the creditor must commence debt enforcement proceedings within ten days of service of the copy of the freezing order.

All other interim measures (i.e. freezing bank accounts or blocking public registry) are governed by the Code on Civil Procedure. For the latter, the applicant must convincingly show (not prove) that there is both a realistic and imminent threat of irreparable harm unless the injunction is granted, and that the underlying cause of action is likely to prevail on the merits.

QUESTION 2

Is there a requirement for a defendant to be notified about a sequestration judgment in your jurisdiction?

USA – HP For the most part yes; that's consistent with our state standards of providing a fair opportunity for the defendant to be heard. There are some instances where notification is not required, for example, if it is proven by affidavit that providing notice before sequestration may result in harm to the asset because of its peculiar value – such as a piece of art. It is also possible, if it can be proven that notice would enable the defendant to abscond with the assets.

Judges will enter an order of sequestration and call for a very quick hearing with both parties to present evidence and determine whether the order should remain in effect or not. By and large, under US law as part of a Supreme Court ruling, notice must be given to the defendant in almost all cases.

China – JZ It is the same in China. The court is required to give notice to the defendant, and the defendant has a chance to appeal that order. Any appeal would not block the process of the sequestration order though and the court could include the defendant's bank account, real estate or any stocks the plaintiff owns. On the one hand, they notify the defendant, but on the other hand, they carry out the sequestration measures immediately.

All sequestration orders require a bond, so if there are any mistakes made by the court, the plaintiff would be liable for any losses suffered by the defendant due to wrongful seizure or freezing actions.

Taiwan – JZ If the plaintiff can provide the convincing evidence to show there are difficulties to collect the claimed amount from the defendant, the judges will enter an order of sequestration without notifying the defendant.

If it is granted, the plaintiff should enforce the order of sequestration within 30 days. Then it is up to the plaintiff to take that pre-judgment attachment order to the tax bureau to obtain a list of assets recorded in the defendant's name. They must then go to each individual bank, property registry or government agency to enforce the attachment.

The defendant will not be notified until the assets are seized. When the defendant receives a sequestration order, he can file an appeal against the order, (any appeal would not block the process of the sequestration order) or provide a bond, determined by the judge and recorded on the sequestration order (usually total amount of the claim), to lift the sequestration order.

Almost all sequestration orders require a bond provided by the plaintiff. If there are any mistakes made by the court, or the order is lifted due to failing to file the lawsuit within the certain period, the plaintiff would be liable for any losses suffered by the defendant due to wrongful seizure or freezing actions.

Switzerland – PR Again, Swiss law distinguishes between monetary claims and non-monetary claims.

In monetary claims, freezing orders are granted by the court without notice to the other party. The other party must file an objection within ten days of receipt of the order.

In the main enforcement proceedings (*Rechtsöffnungsverfahren*), the applicant must demonstrate that his title is valid. The debtor's challenges are limited to arguments according to which the claim has in the meantime been discharged, deferred or has lapsed.

Under the Lugano Convention, the Swiss court will in the same proceeding also render a decision on the enforceability of the foreign judgment without hearing the other party. The other party can then file an objection against the declaration of enforceability within 30 days (if resident in Switzerland) or 60 days (if resident in another Lugano Convention signatory state); and the attachment within ten days of receipt.

In any other claims, a request for interim relief is followed by a hearing at which the court renders its decision. In urgent cases, interim relief may be ordered by the court in *ex parte* proceedings, usually within 24 hours. If such an order is granted, it is followed by an oral hearing at short notice.

Italy – RRS Due process is of the utmost importance in Italy, meaning the defendant has then to be notified by the sequestration order.

If the plaintiff wants an *ex parte* order, they would have to explain to the judge that informing the defendant, or simply taking the extra time to inform the

defendant, may increase the potential prejudice or harm arising from the defendant's unlawful behaviour.

If the plaintiff is able to convince the judge that there is a strong *periculum in mora and fumus boni iuris* argument, the judge has the discretion to grant a sequestration order without hearing the defendant in advance. Once the order is issued, the process server may seize the assets which have been identified.

Otherwise, the judge usually schedules a hearing and grants a deadline to the plaintiff to serve the application and the notice of the hearing to the other side. At the hearing, the application is discussed and, if it is upheld, the order is issued. If the defendant is successful in avoiding the issue of an order, the plaintiff is not prevented from applying again, but will need to gather stronger evidence or seek other solutions to block any assets.

Plaintiffs have 30 days from the day they obtained the seizure order to enforce it, otherwise it will lose effect. Unless the court rules otherwise, the defendant files his answer to the application at the hearing. Upon a plaintiff's request, the court generally sets a deadline for the defendant's answer before the hearing.

Portugal – FG The protective order is granted before notice to the defendant if it is demonstrated that knowledge of the procedures would trigger concealing or disposal of the assets. In any case, after the sequestration is effective, the defendant must be notified and can challenge the protective order in the very same court that applied it or directly appeal the ruling.

In other circumstances, when the judge is not convinced of the merits of the claim or that the sequestration order is necessary to guarantee payment, it will in principle admit the procedures but shall render no ruling before hearing the other party.

In some cases, the judge will impose certain interim measures not exactly to the extension wished for by the plaintiff, or otherwise issue an injunction to the defendant ordering him to refrain from some behaviour or to take some action.

Brazil – PC After you obtain the sequestration order, but before you can sell the assets, it is mandatory to notify the defendant. They can then present an appeal, which needs to be solved through discussion between the plaintiff and the defendant. The necessary actions can be implemented at this point, to convert the sequestration and pay your credits.

A long judicial discussion usually takes place after sequestration, as the completion of the lawsuit takes a long time. Plaintiffs need to offer all kinds of proof that a defendant has sufficient assets and is liable for the debt.

Dominican Republic – PG The petition to seize assets is done in secrecy in the Dominican Republic. The debtor is only aware when they receive notice of the seizure which is already taking place. All the debtor can do then is seek a fast track procedure aimed at releasing the order. The assets are frozen under the order and cannot be moved, but the debtor can continue using those assets.

Usually the judges are not keen to release seizures and they prefer that the collection of assets is completed.

The only way a judge will release a seizure after it's been imposed, is if the creditor has lied to obtain the seizure order, or if the credit is not certain or is not yet enforceable. Those are the kind of things that will move a judge to release a seizure.

Luxembourg – RR The debtor is always informed about the court order in Luxembourg, and a judgment for validation must be requested.

Malta – VD The issuing of a precautionary warrant is virtually automatic, and the defendant need not be served, is not called to testify, and cannot raise any pleas to prevent the order. The defendant may only request the revocation of the warrant after its execution on specific grounds.

The precautionary act may cease to be in force if the lawsuit is not filed within the prescribed period of 20 days, or if any one of the conditions requested by law for the issue of the precautionary act does not exist.

If the amount claimed is excessive, or the security provided to the court is adequate to satisfy the claim, then it may also be revoked. Finally, if it is deemed unreasonable for the warrant to stay in force, or a change of circumstances renders it unnecessary, it can be revoked.

Notwithstanding the relative ease with which a creditor can obtain a precautionary warrant, an abusive, malicious or frivolous request may render the creditor liable to damages and penalties. A creditor may also be condemned to pay penalties should the debtor prove that there was no reasonable doubt as to his solvency and his financial ability to meet the creditor's claims.

QUESTION 3

How can the priority of a judgment be preserved in your jurisdiction?

USA – HP In Florida, no judgment shall be a lien on real or personal property after the expiration of 20 years. To be effective as a lien against real property, the judgment must be re-recorded before the expiration of ten years. If the plaintiff is unable to collect within twenty years, the plaintiff loses lien rights but may still pursue execution on the judgment. A judgment lien securing the unpaid amount of a money judgment may be acquired by filing a judgment lien certificate with the Department of State and re-recording in five years. In terms of priorities, the judgment should be recorded every five years in order to maintain its priority as a claim against the assets of the defendant.

Dominican Republic – PG We don't have that here in Dominican Republic. Yes, the judgment has an enforceable life of 20 years, but we are assuming the judgment has been entered without the creditor obtaining a pre-judgment or seizure order and they are just trying to collect the assets. You don't have priority for an early claim when a judgment is issued. The priority comes when you seize the assets and register the seizure – if you are first, then, there are some advantages.

There is no such thing as priority on the judgment in Dominican Republic, unless it is a tax or labour claim. Those have priority of collection, as do lawyer's fees. Otherwise, there is no such thing.

Brazil – PC In Brazil, if you register the assets correctly, you have the priority and the priority is valid until you have a law suit. There is no timing issue here to regulate sequestration of assets.

Italy – RRS The lifetime of a judgment in Italy is linked to its contents. If the court orders a party to make a payment, the winning party must enforce the judgment within the applicable statutory limitation period, which is in principle 10 years. The judgment remains valid, but the debtor can oppose the statutory limitation.

If a judgment concerning real estate is recorded at the land registry and after that the debtor assigns or transfers the property to a third party, the creditor will be protected. In this instance, the creditor can prevail on the acquiring third party.

Foreign judgments are applicable and can be enforced, to the extent they are not in conflict with the international public policy of Italy. Procedural arguments are frequently opposed, when one is trying to enforce a foreign judgment in Italy.

Portugal – FG In Portugal an arrest or other protective order gives the creditor a certain priority over other creditors in the same class. However, if your credit is common or not privileged it will be superseded by some liens like mortgages or assignments. Labour or maritime credits have their own set of priorities. The tax authorities have certain privileges but not full priority.

When enforcing a judgment, the creditor usually has limited protection against privileged creditors.

Our limitation period for judgments in Portugal is generally 20 years. However, proceedings to collect rents, interest and other periodical credits have to be initiated within five years, professional services within two years and electricity, water, phones and other utilities within six months.

When a protective order is issued you shall initiate the principal proceedings on merit within 30 days. Once the judgment on merit is rendered, you shall have 20 years to collect. Infringing a protective order is a criminal offence.

Malta – VD A favourable court judgment acts as a security for the debt owed by the defendant and constitutes a good title for the registration of a hypothec in the Public Registry. The hypothec ranks according to the date of registration.

Judgments are enforceable for a period of 15 years where the claim exceeds EUR15,000 and 10 years where the claim does not exceed EUR15,000. In the event of expiration, the creditor may request the judgement's reactivation via a court application in which they confirm on oath that the debt is still due. Identical rules apply to foreign judgments.

Taiwan – JZ All judgments are public record and there is no need to register them. They do not create a lien on the assets and this is one of the reasons that we recommend clients obtain a pre-judgment attachment.

If the plaintiff prevails and there is a monetary award, then the defendant has to pay for the assets to be liquidated. If it turns out that the defendant has no assets, then the judgment technically retains its value for ever, until repaid, but it has to be recertified with the local court every few years. The timing differs depending on the nature of the claim though, whether it is a promissory note or a commercial

transaction, for example. The recertification timings can vary between 3-15 years and can be extended indefinitely.

The assets owned by the defendant at the time of judgment are attached, however if after the judgment is issued, the defendant opens a new bank account, that will not be monitored by anyone so the plaintiff has to check for new assets periodically.

Taiwan is not a signatory to the Hague Convention on foreign judgments, but generally adheres to the reciprocity principal. If your jurisdiction enforces Taiwan judgments, then a Taiwan court will enforce a judgment from your country, providing it does not go against public policy.

Luxembourg – RR Judgments are not registered in Luxembourg. Once serviced, they are enforceable without limit in time. Foreign judgments are also applicable, either automatically via the EU regulation or after a procedure of homologation.

Luxembourg sees a lot of seizure cases, as debtors often own assets/accounts/receivables in this jurisdiction, even if parties are not litigating before Luxembourg Courts or residing in this country. As access to justice is free, we are often requested to seek seizure orders.

China – JZ In China, like in Taiwan, our judgments are public record, so there is no need to register a judgment.

We do have a recent development designed to better enforce judgments, however, that is worth highlighting. In China, 40 per cent of judgments are not enforceable and a lot of debtors try every means possible to avoid the debt.

The Supreme Court has created a central list of all those debtors who are unable to pay the debt. They are then fed into the system as discredited persons, which includes the company itself, as well as the legal representative. The person listed will not be able to take airplanes, or high speed trains or stay in luxury hotels. There will also be a travel ban outside China. It's a strong weapon that the court uses to enforce judgments here.

In terms of the life of the judgment, it's forever until the debt is repaid. Foreign judgment acceptance is based on the reciprocity principle, so if a foreign country enforces Chinese judgments then China will do the same.

Recovery against a closely held business entity is similar to the piercing of the corporate veil principle. It is applicable in China if the plaintiff can prove that the defendant has used the corporate shell to hide their personal activities and used the same bank accounts to facilitate payment. The court would then be able to pierce the corporate veil and enforce against the actual person in control. The personal assets of that individual would then be included in a corporate dispute.

Switzerland – PR An applicant who has secured the freezing of assets does not enjoy priority, or preferential rights or lien in relation to the attached property. The applicant must follow the ordinary debt enforcement process like any other creditor. However, if another creditor demands seizure of the assets before the applicant is in a position to do so, the applicant automatically and provisionally takes part in the seizure of property.

Judgments ordering any payment are enforced under the Federal Debt Enforcement and Bankruptcy Act. The party with the judgment in its favour can start summary enforcement proceedings by requesting the court to set aside the opposition the defendant raised against the payment summons and to order the continuation of enforcement through the freezing of assets or bankruptcy proceedings (for legal entities).

Judgments for specific performance are enforced under the Code on Civil Procedure and must also be requested in summary proceedings with the enforcement court at the place of residency or at the place of registered office (for legal entities). Enforcement requests can also be brought at the place where these measures are to be executed, or where the original judgment was rendered.

If the judgment was rendered by a court of a Lugano Convention signatory state, an enforcement application must be filed with the competent Swiss court, along with a copy of the judgment satisfying the conditions necessary to establish its authenticity and a certificate issued by the court that rendered the judgment (Annex V, Lugano Convention).

A judgment rendered in a state not party to the Lugano Convention is considered a final judgment within the meaning of the Federal Debt Enforcement and Bankruptcy Act. A local court can grant exequatur on a summary review of the matter.

Contacts

UK HEAD OFFICE

IR Global
The Piggery
Woodhouse Farm
Catherine de Barnes Lane
Catherine de Barnes B92 0DJ

Telephone: +44 (0)1675 443396

www.irglobal.com
info@irglobal.com

KEY CONTACTS

Ross Nicholls
Business Development Director
ross@irglobal.com

Rachel Finch
Channel Sales Manager
rachel@irglobal.com

Nick Yates
Editor
nick@irglobal.com

CONTRIBUTORS

Filipa Godinho (FG)
Valadas Coriel & Associados – Portugal
valadascoriel.com/portfolio-type/filipa-pacheco-godinho

Harry A. Payton (HP)
Payton & Associates – US, Florida
irglobal.com/advisor/harry-a-payton

Jian Zhang (JZ)
Pamir Law Group – China
pamirlaw.com/en/professionals/jian_zhang

Juan Carlos Madrigal (JM)
Pamir Law Group – Taiwan
irglobal.com/advisor/juan-carlos-madrigal

Ruggero Rubino Sammartano (RRS)
LawFed BRSA – Italy
irglobal.com/advisor/ruggero-rubino-sammartano

Roy Reding (RR)
Reding Legal – Luxembourg
irglobal.com/advisor/roy-reding

Peter Ruggle (PR)
Ruggle Partner – Switzerland
irglobal.com/advisor/peter-ruggle-switzerland

Veronique Dalli (VD)
Dalli Advocates Law Firm – Malta
irglobal.com/advisor/veronique-dalli

Paulo Sergio Ferraz de Camargo (PC)
Ferraz de Camargo and Bugelli Lawyers – Brazil
irglobal.com/advisor/paulo-sergio-ferraz-de-camargo

Pablo Gonzalez (PG)
González Tapia Abogados – Dominican Republic
irglobal.com/advisor/pablo-gonzalez-tapia