Obtaining attachment on cryptocurrencies in Switzerland

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The general view in Switzerland is that cryptocurrencies are intangible assets sui generis and as such can be subject to regular debt enforcement and insolvency proceedings in Switzerland (provided that these cryptocurrencies have a financial value).

This article highlights the particularities to be considered when cryptocurrencies are the target of an attachment procedure (ie, a freezing order) in Switzerland.

Attachment

The following must be established to obtain an attachment in Switzerland:

- there is a claim, which is unsecured and due;
- there is a statutory ground for an attachment (eg, the debtor is domiciled abroad, concealing assets, absconding or making preparations to abscond so as to evade its obligations or there is a final title – such as a judgment, an award or similar – confirming the claim); and
- there are assets in Switzerland which belong to the debtor.

While the first two conditions do not normally pose any difficulties, this may be different for the third requirement where cryptocurrencies are concerned.

The court or the debt enforcement office, which approve and enforce attachment orders, are not required to conduct investigations as to the debtor's assets ex officio. Also, the debtor need not disclose its assets or provide any information whatsoever in that regard to the creditor or the authorities. It is therefore the creditor's task to establish prima facie that there are assets in Switzerland belonging to the debtor. In other words, the creditor must show to the court that the debtor – in all likelihood – possesses tokens.

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Evidence

This situation is aggravated by the rule that in general only documentary evidence is admissible in attachment proceedings (ie, witnesses will not be cross-examined, witness statements will not be taken and affidavits are inadmissible in attachment proceedings). In other words, the creditor in its request for attachment must file documents, which evidence that the debtor is in possession of tokens. The creditor may submit, for example, correspondence (eg, emails or messages exchanged on mobile devices) in which the debtor mentions that it owns tokens or any proof that the debtor purchased tokens on the occasion of an initial coin offering (ICO); the creditor may even submit public statements made by the debtor, where the debtor brings up their investment in cryptocurrencies (eg, interviews or blogs).

Place of jurisdiction

Another delicate issue that may arise is the place of jurisdiction (ie, where a request for attachment may be filed). According to Swiss statutory rules, a request for attachment may be filed either with the court:

- at the debtor's domicile or registered office; or
- at the place where the debtor's assets are physically located.

Because cryptocurrencies are intangible assets sui generis, they lack physical form and thus have no physical location. Arguably, cryptocurrencies are deemed physically located at the place where the respective token's private key is being stored, since such private key gives its user exclusive control over the token (the reason why it is typically kept secret). There are different ways and means to keep and store private keys, including:

- printing the private key on paper (paper wallet);
- storing the private key on a private storage device (hardware wallet). The private storage device may be an online or offline device such as a laptop, hard drive, SSD, HDD or private server. The user may choose to manage the private key through a wallet software, any other application or none; and
- using the online services of a third-party provider (online wallet), such as exchange platforms and online wallet providers. Such online wallets are accessible through a computer or any other device that enables internet connection. The user may access the wallet through multiple devices, since the relevant information is stored with the third-party provider.

Whereas with paper and hardware wallets, the user remains in full exclusive control over the private key (and thus the token), this may not necessarily be the case with online wallets, as the wallet's provider may have control over the private key (so-called 'custody wallet provider').

The form of storage and control may determine the physical location of the token: if the token's private key were stored in a paper or hardware wallet, the token's physical location could be

where the paper or hardware wallet is physically located. For example, if a token holder locks the paper or hardware device in a vault, the token's location would be at the location of the vault. However, if the token's private key was stored with an online custody wallet provider, the token's physical location could be where the provider has its registered office or domicile. If the paper or hardware wallet is physically located in Switzerland or if the online wallet provider has its domicile or registered office in Switzerland, the Swiss courts could have jurisdiction in Switzerland to issue attachment orders.

Comment

As mentioned, when cryptocurrencies are the target of an attachment procedure in Switzerland, it is the creditor's task to establish prima facie that there are assets in Switzerland belonging to the debtor. Therefore, in an insolvency context, a bankruptcy administrator may have to locate and liquidate cryptocurrencies held by the liquidated company and creditors may want to recover the cryptocurrencies which they invested during an ICO associated therewith. However, the fact that many cryptocurrencies operate on decentralised networks based on blockchain technology and the form of storage and control of tokens make asset seizure and attachment all the more difficult.

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