# Debt Enforcement and Bankruptcy Act

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COMMENTARY ON

# Art. 8 DEBA

A commentary by Tobias Aggteleky / Philip Carr

SUGGESTED CITATION

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**E. Protocols and registers**

**1. Keeping, evidential value and correction**

**Art. 8**

[1] The debt enforcement and bankruptcy offices shall keep minutes of their official activities and of the requests and declarations received by them; they shall keep registers.

[2] The minutes and registers shall be conclusive of their contents until proven otherwise.

[3] The debt collection office shall correct an incorrect entry ex officio or at the request of an affected person.

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# CONTENT

# I. GENERAL

1 Article 8 SchKG governs the keeping of minutes and registers by the debt enforcement and bankruptcy offices as well as the probative value of such minutes and registers. It also applies to atypical bodies such as the extraofficial bankruptcy administrator elected by creditors (Art. 241 SchKG), the administrator in composition proceedings (based on Art. 295 para. 3 SchKG) and the liquidator (Art. 320 para. 3 SchKG).

2 In its present form, Art. 8 SchKG has existed since the revision of the SchKG in 1994; prior to that, the content of Art. 8 SchKG and the right of inspection under Art. 8a SchKG were regulated jointly in Art. 8 aSchKG.

3 Specifications of Art. 8 SchKG can be found in the VABK as well as in the VFRR and the KOV.

# II. KEEPING OF MINUTES AND REGISTERS (PARA. 1)

## A. Purpose and scope of application

4 The purpose of the obligation to keep minutes and registers is to ensure that the debt enforcement and bankruptcy proceedings can be monitored at all times and that the actions taken can be traced. Accordingly, offices are required under Art. 1 VABK to keep the files clearly organized and together. In this way, the minutes and registers also help the supervisory authorities to establish the facts of the case (cf. Art. 20 para. 2 no. 2 SchKG) and thus to fulfill their supervisory function.

5 The duty to keep minutes and registers applies on the one hand to official activities and on the other to requests and declarations received. The term "official activities" includes all actions by the office that are carried out in relation to a pending debt collection or an ongoing bankruptcy. For example, issued payment orders and bankruptcy threats must be included in the files and executed seizures must be recorded.

6 Any oral or written submissions by the parties in connection with debt enforcement or bankruptcy proceedings shall be deemed to be requests and declarations. Since the contents of the party's requests and declarations are not covered by the evidentiary value according to Art. 8 para. 2 SchKG, they

do not have to be recorded in detail; rather, it is sufficient to document when, where and to whom declarations relevant under debt collection law were made.

Requests for information pursuant to Art. 8a SchKG and the information provided in this context are not covered by Art. 8 para. 1 SchKG. Although in practice such requests are often kept for a reasonable period of time and may be inspected by the debtor in this case, there is no obligation to keep minutes and registers in this respect. 7

## B. Minutes and Registers

The keeping of registers by debt collection offices is specified in the VFRR. 8
According to Art. 8 para. 1 VFRR, the following books are provided for: The Receipt Register (Art. 9 VFRR), the Debt Collection Register (Art. 10 VFRR), the Group Register (Art. 11 VFRR), the Register of Persons (Art. 12 VFRR), the Diary and Agenda (Art. 13 VFRR), the Cash Register (Art. 14 VFRR) and the Current Account Register (Art. 15 VFRR).

The debt collection ledger is of particular importance. All debt collection proceedings are entered in it in the order in which the debt collection requests are received. In particular, the type of debt collection, the name of the debtor and the creditor, the amount of the claim including interest and the date of receipt of the debt collection request are recorded (Art. 10 VFRR). The debt collection register also records "silent" debt collections, i.e. those where the debt collection request is withdrawn before the order for payment is issued, so that they do not result in an entry in the debt collection register. 9

The keeping of registers by bankruptcy offices is regulated by the KOV. The following registers and books are to be kept by the bankruptcy offices pursuant to Art. 1 KOV: The register of bankruptcies and requests for legal assistance (Art. 4 KOV), the cash book (Art. 16 KOV), the current account book (Art. 17 f. KOV) and the balance sheet book (Art. 19 KOV). 10

These registers and books must be kept in accordance with the models set out in the Annex to the KOV (Art. 3 para. 1 KOV). The cantons may permit or even prescribe other forms (Art. 3 para. 2 KOV). 11

## C. Type and duration of storage

12 The manner in which debt enforcement and bankruptcy files are kept is governed by the VABK. In principle, the (original) files must be retained. However, with the consent of the cantonal supervisory authority, the records may also be kept in electronic form (Art. 4 para. 1 VABK, Art. 15a para. 1 KOV, Art. 8 para. 2 VFRR). The original files may be destroyed in this case.

13 With regard to the duration of storage, Art. 2 para. 1 VABK provides that the files of settled debt enforcement proceedings may be destroyed ten years after they have been settled. All debt enforcement proceedings that have either been formally concluded or cannot be continued by an ordinary request of the creditor - namely by a request for continuation - are deemed to have been settled. The debt collection books and the associated registers of persons, on the other hand, must be kept for 30 years from their conclusion (Art. 2 para. 2 VABK).

14 With regard to the bankruptcy files, the VABK refers in Art. 5 to the KOV. According to Art. 14 KOV, the files of completed bankruptcies may be destroyed after ten years from their completion, the cash books together with supporting documents, the current account books and balance sheet books after ten years from their completion. The bankruptcy register, on the other hand, which contains basic information such as the opening of bankruptcy proceedings, the nature of the bankruptcy proceedings and the termination of the bankruptcy, must be retained for 40 years from the date of its completion (Art. 14 para. 2 KOV).

# III. EVIDENTIAL VALUE (PARA. 2)

## A. Effect

15 Pursuant to Art. 8 para. 2 SchKG, the minutes and registers under debt collection law are conclusive of their content until the contrary is proven. They therefore have the heightened probative force of public documents (cf. Art. 9 CC and Art. 179 CPC). However, the minutes and registers do not enjoy public faith; neither do the entries have constitutive (positive or negative) effect nor are they fictitious for third parties acting in good faith.

Rather, Art. 8 para. 2 SchKG establishes a rule of evidence: The content of minutes and registers under debt collection law is deemed to be proven as long as it is not shown to be incorrect. In other words, the accuracy of debt collection records and registers is rebuttably presumed. 16

This presumption can only be rebutted by proof to the contrary in the sense of main evidence - and not by mere counter-evidence. The proof of the contrary consists in the proof of the incorrectness of the contents of the relevant protocol or register. This proof is not bound to any special form and can be carried out accordingly with all means of evidence (cf. Art. 9 para. 2 CC). 17

## B. Scope of application

The probative value of minutes and registers under debt collection law applies to all minutes and registers used by the debt enforcement or bankruptcy office. However, only the actual content that records official acts or has been perceived by the debt enforcement or bankruptcy official himself is covered. The probative value thus relates primarily to when, where and by whom certain statements were made. 18

In contrast, the content of mere party statements or declarations that have been recorded or included in the files are not covered by Art. 8 para. 2 SchKG. Likewise, the probative value does not extend to assertions that do not result from minutes or registers. Quite fundamentally, the absence of a particular entry does not lead to the presumption that the corresponding act did not take place. 19

# IV. CORRECTION (PARA. 3)

Register and record entries must be corrected by the debt enforcement or bankruptcy office if they are incorrect. This correction must be made in due form and free of charge. Art. 8 para. 3 SchKG covers not only debt collection offices but also bankruptcy offices (cf. Art. 20 KOV) as well as all other authorities and bodies entrusted with the keeping of minutes or registers. 20

Only errors made by debt enforcement or bankruptcy offices or by the corresponding body keeping the minutes or register are subject to correction. Such an error is deemed to be, for example, the entry of an incorrect order in the entry register or the entry of a claim amount in the debt collection register that does not correspond to that in the debt collection request. However, if 21 the fault for an alleged error lies not with the debt collection office but with the creditor, there is no room for correction; for the debt collection office does not act erroneously if it takes over incorrect information from a creditor.

22 The competent authorities are obliged to make corrections ex officio. If an authority refuses to make the correction, the person concerned may appeal under debt collection law (Art. 17 SchKG).

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COMMENTARY ON

# Art. 8a DEBA

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**2. Right of inspection**

**Art. 8a**

[1] Any person who can credibly demonstrate an interest may inspect the minutes and registers of the debt enforcement and bankruptcy offices and obtain extracts therefrom.

[2] Such an interest is prima facie established in particular if the request for information is made in direct connection with the conclusion or settlement of a contract.

[3] The Offices shall not give third parties knowledge of an enforcement if:

a. the debt collection is null and void or has been revoked on the basis of an appeal or a court decision14;

b. the debtor has prevailed in an action for recovery;

c. the creditor has withdrawn the debt collection;

d. the debtor has submitted a request to this effect after the expiry of a period of three months from the date of service of the order for payment, if the creditor fails to provide proof after the expiry of a period of 20 days set by the debt collection office that proceedings for the removal of the advance payment order (Art. 79-84) have been initiated in good time; if this proof is subsequently provided or if the debt collection proceedings are continued, they shall again be brought to the attention of third parties.

4 The right of inspection of third parties shall expire five years after the conclusion of the proceedings. Judicial and administrative authorities may continue to request extracts in the interest of proceedings that are pending before them.

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# CONTENT

# I. GENERAL

1 The inspection and disclosure of public law documents shall be governed by the relevant provisions of public law. In accordance with this principle, inspection of the minutes and registers of the debt enforcement and bankruptcy offices is always governed by Art. 8a SchKG. This also applies if inspection is requested in the context of pending civil proceedings.

2 The FADP does not apply due to the exclusion in Art. 2 Abs. 4 FADP.

## A. Purpose

3 According to Art. 8a SchKG, the minutes and registers of the debt enforcement and bankruptcy offices are accessible to third parties, provided they credibly demonstrate a corresponding interest. At the center of the right of inspection is the debt collection register excerpt. The debt collection data serve to draw conclusions about the creditworthiness of a person.

4 The right of inspection under Art. 8a SchKG is thus relevant both at the precontractual stage, in order to check the creditworthiness of a potential debtor, and at the stage of existing debt relationships, when the question arises as to whether the collection of a debt is worthwhile. The right of inspection is therefore (also) in the public interest, as it avoids hopeless court and enforcement proceedings. In addition, the right of inspection can be helpful for the calculation of deadlines (e.g. for the attachment pursuant to Art. 110 and 111 SchKG).

5 The purpose of the right of inspection is different in the case of bankruptcy of a debtor. In this case, the debtor's inability to pay is usually evident. Here, Art. 8a SchKG serves to provide the bankruptcy creditors and third parties who have suffered damage with the information necessary to protect their rights.

## B. Problems and related revisions

6 The legitimate interest of third parties to inspect the records and registers of the debt enforcement and bankruptcy offices is offset by the equally legitimate interest of the (alleged) debtor that the debt enforcement data do not create the false impression of a lack of creditworthiness. Art. 8a SchKG is intended to reconcile these two interests. It is therefore not surprising that the

two revisions of Art. 8 and 8a SchKG in 1994 and 2019, respectively, mainly revolved around this issue.

On the occasion of the 1994 revision, the content of Art. 8 aSchKG was distributed between Art. 8 and Art. 8a SchKG. With regard to the interest in inspection and its limits, the revision was primarily intended to codify the case law of the Federal Supreme Court at that time. The rulings issued prior to the revision are thus still relevant. 7

In contrast, the 2019 revision introduced an additional instrument, Art. 8a para. 3 lit. d SchKG, with which affected parties can defend themselves against the negative effects of unjustified debt collection. At the same time, the informative value of extracts from the debt collection register should be improved and not diluted. 8

## II. PERSONS ENTITLED TO INSPECT

### A. General

A right to inspect the minutes and registers of the debt collection and bankruptcy offices is available to any person who can credibly demonstrate a legally sufficient interest in doing so. This interest need not be of a financial nature; a legal interest of another kind is also sufficient. The extent to which an interest in inspection is worthy of protection must be determined in each individual case on the basis of the specific circumstances and taking into account the purpose of the right of inspection. The interest worthy of protection is assessed in particular according to the person or the position of the applicant. In order to assess the right of access, a distinction must be made between the following applicants in the light of the case law of the Federal Supreme Court: 9

- The person concerned requesting inspection of the entries relating to him/herself (hereinafter B);
- the parties to a specific debt enforcement or bankruptcy proceeding who wish to inspect the records of the proceeding in question (C below);
- third parties who wish to obtain information about a person, typically a (potential) debtor, outside of debt enforcement or bankruptcy proceedings (D below); and

- judicial and administrative authorities who wish to inspect files in connection with proceedings pending before them (hereinafter E).

## B. Person concerned

10 Every person has the right to inspect all data concerning him/herself. This right is not subject to any further conditions - with the exception of the prior identity check and the fees for file inspection. In this way, any person can check at any time and without any special proof of interest whether and what information is stored about them. Self-disclosure can only be restricted in the case of overriding public or third-party interests.

## C. Parties to the proceedings

11 Furthermore, the parties to debt enforcement or bankruptcy proceedings are in principle entitled to inspect the minutes and registers of the proceedings concerned. Thus, like the person concerned in the case of self-disclosure, they do not have to credibly demonstrate any additional interest; rather, their legitimate interest derives directly from their debtor or creditor position. In this context, the (potential) creditor suing for admission by means of a collocation action is also deemed to be a bankruptcy creditor.

12 The purpose of the request for inspection may also lie outside the relevant compulsory enforcement proceedings: thus, according to the Federal Supreme Court, inspection must also be granted if a bankruptcy creditor has suffered damage in the bankruptcy irrespective of his creditor position and intends to gather evidence by inspecting the bankruptcy files in order to sue a third party for the loss. The prohibition of abuse of rights is always reserved.

## D. Third parties

13 Any third party who can credibly demonstrate a special and present interest worthy of protection is then entitled to information. Unlike the person concerned and the parties to the proceedings, third parties cannot derive their interest from their (procedural) position, which is why their right of inspection is not given a priori. Rather, in the case of third parties, the requested debt enforcement or bankruptcy office must weigh up their interest in inspection against the interest in secrecy of the person concerned and, based on the specific interests involved, grant or refuse inspection to a certain extent. For this

purpose, a corresponding proof of interest is required from the third party submitting the request.

Pursuant to para. 2, an interest is considered to be worthy of protection in particular if the request is made in direct connection with the conclusion or performance of a contract. This provision was included in the law as part of the 1994 revision and codified the Federal Supreme Court case law according to which a sufficient interest in inspection exists both in the case of an existing contractual relationship with the debtor and in the case of an intended contractual relationship. 14

Also under para. 2, however, the right of inspection does not apply without restriction. Here, there is merely a legal presumption of an interest in inspection that is worthy of protection - overriding interests in secrecy are conceivable. For example, when concluding an employment contract, there is often no connection between the creditworthiness of the potential employee and the risk to legitimate interests of the employer requesting information, which is why the employee's interest in confidentiality is likely to prevail here as a rule. Then, restrictions are possible with regard to the scope of the inspection of files. 15

A legally sufficient interest in inspection will typically exist in the following constellations: 16

- There is a legal dispute between the applicant and the person concerned. However, this - hitherto constant - case law of the Federal Supreme Court has been restricted in recent decisions with regard to bankruptcy files, with the courts relying on different arguments: According to the Zurich High Court, the right of inspection under Art. 8a SchKG in pending civil proceedings is superseded by the rules on edition in the CPC (Art. 160 et seq.). And according to the Federal Supreme Court, there is in any case no interest in inspection worthy of protection if the applicant is not at the same time a (potential) creditor of the other party.
- At least for an inspection of the debt collection register, the concrete intention to file a lawsuit against the person concerned is sufficient - even outside an existing contractual relationship. This is because the applicant has a legitimate interest in checking the creditworthiness of the other party due to the legal costs incurred.

- The applicant is the guarantor or jointly and severally liable party of the person concerned.
- In the case of spouses, on the basis of the duty to provide information under Art. 170 of the Swiss Civil Code - regardless of whether they live together or separately.
- The requesting shareholder with regard to the bankruptcy proceedings of the bankrupt company.
- The person concerned is a co-heir of the applicant. The right of inspection of the co-heirs also includes registers and minutes relating to the time before the death of the decedent.
- The applicant is considering a third party claim to the shares in a company which have been drawn to the bankruptcy estate. His right in this regard is to inspect the balance sheets and income statements of the company in question.
- In the case of a request for inspection by the media, as long as this relates to a specific case in which there is a certain public interest. In contrast, general "press inquiries" in the sense of general requests for information on a large number of debtors are insufficient.
- In the case of a fulfilled and thus concluded (purchase) contract, provided that follow-up transactions can be expected.
- In the case of a request for inspection by the creditor of a bankrupt general partnership against the individual general partners, since the latter are personally liable.

17 In contrast, there is no sufficient interest in inspection in the following circumstances:

- If the applicant is merely in economic competition with the person concerned.
- In the case of mere curiosity.
- If there are no indications of business contact between the applicant and the person concerned.
- In the case of unspecific requests for inspection by the media.
- In the case of a mere abstract interest, e.g. to collect data on debtors.

- In the case of the defendant in a liability suit raised by the bankruptcy estate, if the defendant is neither a bankruptcy creditor nor wishes to sue a third party for damages.

## E. Judicial and administrative authorities

Finally, pursuant to Art. 8a para. 4 sentence 2 SchKG, judicial and administrative authorities may request extracts from the debt enforcement and bankruptcy files in the interest of proceedings pending before them. However, this also presupposes an interest worthy of protection, whereby this usually results from the special position of the requesting authority. Thus, the Federal Supreme Court has also stated "that the judicial and administrative authorities are in principle entitled to an unconditional right to receive information concerning the situation of the debtor as it appears from the books and registers". It has not been conclusively clarified whether the pending proceedings must relate to the person concerned and whether an interest worthy of protection to inspect files is also conceivable outside of pending proceedings. 18

# III. PROVIDING PROOF OF INTEREST

The question of the interest in inspection worthy of protection must be distinguished from the question of the degree of proof and the manner in which this interest must be demonstrated. Before the 1994 revision, the applicant was required to prove an interest. The requirements for this proof were high: although the Federal Supreme Court, with reference to the French and Italian legal texts, already at that time allowed a prima facie case to suffice, it also required that this prima facie case be made by means of documents. In principle, the Federal Supreme Court considered only documents issued or signed by the potential debtor to be sufficient (e.g. signed loan agreements, letters of confirmation from the debtor), but not documents produced by the applicant himself (e.g. invoices and [reminder] letters from the applicant). 19

In the revision of 1994, the wording of the law was adapted; the interest in inspection now only has to be explicitly shown to be credible. Art. 8a SchKG does not require documentary evidence or prima facie evidence. 20

In its ruling 7B.229/2003, the Federal Supreme Court commented on this new wording of the law as follows: First, it stated that the revision was merely intended to codify the case law of the Federal Supreme Court and that nothing 21 had changed in the legal situation (E. 4.1). Subsequently, the Federal Supreme Court stated that the prima facie case was not bound to a certain form (E. 4.2). Nevertheless, it concluded - in accordance with its previous case law - that the submission of copies of invoices was not sufficient under the new Art. 8a SchKG (E. 4.3). As a result, everything remained the same.

22 This decision was rightly criticized by the doctrine and occasionally also by the cantonal courts. However understandable the desire for a clear and simple rule for the debt collection and bankruptcy offices, the general principles on prima facie evidence should nevertheless also apply to Art. 8a SchKG. A fact is deemed to have been made credible if the court, in a free review of the submissions, comes to the conclusion that it is true with a certain degree of probability. A fact is thus prima facie established if certain elements speak in favor of its existence, even if the court still reckons with the possibility that it may not have materialized.

23 Both a contract offer not (yet) signed by the person concerned or an unsigned order form and invoices addressed to the person concerned may suffice in individual cases to make an interest worthy of protection credible - provided that sufficient credibility results from the overall circumstances. Particularly in the case of a verbally concluded contract, the creditor is dependent on the presentation of invoices entitling him to inspect them, since the debtor - in contrast to the situation prior to the conclusion of the contract - will hardly be willing to obtain and present an extract from the debt collection register himself.

## IV. SUBJECT MATTER, FORM AND SCOPE OF THE RIGHT OF INSPECTION

### A. Subject matter

24 Contrary to the wording of Art. 8a para. 1 SchKG, the right of inspection covers not only minutes and registers, but all files and documents of debt enforcement or bankruptcy proceedings. Thus, the right of inspection in debt enforcement proceedings extends, for example, to seizure records and the files proving third-party ownership claims. In bankruptcy proceedings, on the other hand, both the company files, i.e. the files of the bankrupt company, and the procedural files are subject to the right of inspection.

The company files include all business correspondence, any minutes and audit reports, as well as the complete accounts including vouchers and "other relevant documents", which the bankruptcy office is obliged to keep safe (cf. Art. 223 para. 2 SchKG). The procedural files that may be inspected include the bankruptcy record, the collocation plan together with the list of encumbrances, the property realization records, the distribution lists, the inventory, the list of claim submissions together with supporting documents (including those of the other creditors), the minutes of the creditors' meetings and the creditors' committee, the reports of the bankruptcy administration and the court orders on the closure and revocation of the bankruptcy proceedings. 25

The person concerned may also request information on who has requested access to the files relating to him or her and when. However, federal law does not contain any provision requiring the debt collection office to keep records of information provided, which is why such a request can only be granted if the information in question is actually available. 26

## B. Form

In addition to the actual right to inspect files, the entitled party also has the right to obtain excerpts from the minutes and registers. This right, which is infinitely more important in practice, is in principle as broad as the right of inspection. In other words, copies of the files subject to the right of inspection may be requested. Only in exceptional cases may an office refer the applicant to personal inspection, namely if this would save the office unreasonable expense. However, there is no entitlement to the issuance of files. 27

According to the practice of the debt collection offices, both in the case of a self-disclosure and in the case of a request by a third party who does not make a further request, only summary information is provided, namely in the form of the so-called simple debt collection register extract. This contains a list of all debt collection proceedings initiated against the person concerned at the debt collection office concerned over the past five years, stating the name of the creditor bringing the proceedings and any representative, the amount of the claim, the date and the current status of the debt collection proceedings. 28

The simple excerpt from the debt collection register also contains the number of certificates of loss from seizures recorded in the relevant debt collection 29 district and not yet redeemed in the last 20 years. Finally, it also lists the openings of bankruptcy proceedings and the conclusion of bankruptcy proceedings that have been reported to the debt collection office concerned in the course of the past five years.

30 The simple excerpt from the debt collection register does not include the debt collection proceedings that cannot be viewed pursuant to Art. 8a para. 3 lit. a-d and the so-called silent debt collection proceedings. In order to get an idea of the silent debt collection proceedings, which may be of interest in particular for the question of the interruption of the statute of limitations, it is rather necessary to have a look at the debt collection register.

## C. Scope

31 If the applicant has credibly shown an interest in inspection worthy of protection, this does not mean that he may inspect all debt enforcement or bankruptcy files without restriction. This is because the scope of the right of inspection is always determined by the interest existing in the individual case. The decision on the right of inspection granted in an individual case is based in each case on a weighing up of the applicant's interest in the most comprehensive information possible and the data protection interest of the person concerned.

32 Frequently, applicants are only interested in a simple extract from the debt collection register. In this case, a restriction of the scope of access is out of the question from the outset. The situation is different in bankruptcy proceedings: Here, the question arises as to which documents creditors may inspect and which they may not. In this context, the Federal Supreme Court has stated that, in principle, bankruptcy creditors are entitled to inspect all documents relating to the bankruptcy in question. Only in exceptional cases is it permissible to deny a bankruptcy creditor access to certain documents, for example (a) if the creditor requests access for reasons that have nothing to do with his status as a creditor, (b) if access would not serve any reasonable purpose but would only cause useless inconvenience, or (c) if the disclosure of a certain document would conflict with the overriding confidentiality interests of the person concerned.

# V. EXCLUSION OF THE RIGHT OF INSPECTION

## A. Problem

In Switzerland, a (putative) creditor can initiate debt enforcement proceedings without having to prove the existence of his claim. On the one hand, this special feature of Swiss enforcement law leads to substantial cost savings, since not every claim, no matter how clear, has to be established in court before it can be enforced. On the other hand, however, this liberal order harbors a certain potential for abuse, since unjustified debt collection proceedings can also find their way into the debt collection register, which is open to inspection by interested third parties. In particular, debt collection proceedings against which the person concerned has lodged a legal objection and thereby obtained the (provisional) discontinuation of the debt collection proceedings remain listed in the debt collection register and are accessible to third parties - albeit with the note that a legal objection has been lodged. 33

With this in mind, para. 3 of Art. 8a SchKG stipulates that the debt collection and bankruptcy offices may not disclose knowledge of a debt collection to third parties in certain cases. These entries are not deleted, however, but merely marked with a corresponding note so that they are no longer disclosed to third parties. This special feature is due to the function of the logs and registers: this consists primarily of documenting the official activities of the debt collection and bankruptcy offices; they only perform their role as an instrument of credit protection as a secondary function intended by the legislator. Internally, therefore, all debt collection actions and thus all debt collection proceedings must remain documented. Notwithstanding this, the term "cancellation" is often used in a non-technical manner. 34

## B. Invalid debt collection or debt collection annulled on the basis of a complaint or a court decision (Art. 8a para. 3 lit. a)

### 1. Null and void debt collection

A debt collection is void if it has been initiated in abuse of rights or in error. 35
Nullity must be observed ex officio and does not require a corresponding determination by the supervisory authority. Therefore, nullity may be asserted both before the supervisory authority and directly before the debt collection or bankruptcy office. Since the debt collection office is seldom in a position to

recognize the nullity of a debt collection on its own, in practice the debtor will challenge the payment order by means of a supervisory complaint (Art. 17 SchKG). After expiry of the appeal period, the debtor may notify the supervisory authority of the nullity by means of a supervisory notification (Art. 22 para. 1 SchKG) and thus obtain a declaration of nullity.

36 Nullity may only be assumed in exceptional cases, namely if it is obvious that the alleged creditor is pursuing objectives with the debt collection that have nothing whatsoever to do with enforcement. Such extraneous goals are pursued if the creditworthiness of the (alleged) debtor is merely to be damaged or if, for the purpose of harassment, a completely exaggerated amount is put in debt collection. As long as the creditor with the debt collection actually aims at the collection of a claim asserted by him, abuse of rights is basically excluded. 2.

### 2. Debt collection annulled on the basis of a complaint under debt collection law

37 A debt enforcement action contested by means of a complaint under debt enforcement law (Art. 17 SchKG) and annulled by the supervisory authority may also no longer be brought to the attention of third parties. In contrast to nullity, this does not concern debt enforcement proceedings initiated in abuse of rights, but rather those in which the debtor has suffered a disadvantage due to an infringing or unreasonable order. There is no nullity, for example, if a locally incompetent debt collection office issues the order for payment; such an order for payment is merely contestable. 3.

### 3. Debt collection proceedings cancelled on the basis of a court decision

38 Finally, no inspection is granted for debt collection proceedings that have been annulled by a court decision. The Federal Supreme Court has clarified that the annulment of the debt collection does not necessarily have to be ordered in the dispositive of the relevant court decision. It is sufficient if it is clear from the result of the proceedings that the debt collection was unjusti-

fied when it was initiated. Accordingly, a court decision that has as its object the annulment of the debt collection is present in the following cases:

- Approval of a petition under Art. 85 SchKG or an action under Art. 85a SchKG: If the debt does not exist or no longer exists, the debt collection must be cancelled. Partial cancellation of the debt collection is also permissible; in this case, the right of inspection is reduced to the remaining amount. In contrast, a discontinuation due to deferral does not justify a restriction of the right of inspection.

- Approval of a (general) negative declaratory action pursuant to Art. 88 CPC. However, as a result of the new version of Art. 85a CPC in the context of the 2019 revision of the SchKG, the general action for a declaratory judgment under Art. 88 CPC is likely to be of little practical significance in debt enforcement proceedings.

- Approval of an action for revocation or dismissal of an action for recognition.

No sufficient reason to deny third parties access to a particular debt collection 39 is the settlement of the underlying debt. This legal consequence, which is difficult to comprehend especially for laypersons, has its justification: After all, even a merely temporary non-payment of a debt due is certainly of interest to future creditors with regard to the creditworthiness of a debtor.

A judicial annulment of a debt collection does not therefore in every case lead 40 to the debt collection no longer being disclosed. If the debtor has repaid the debt on which the debt collection is based only after the debt collection has been raised, he cannot have the debt collection in question cancelled via the detour of Art. 85 SchKG or Art. 85a SchKG. If a debtor pays the debt enforced directly to the debt enforcement office (cf. Art. 12 para. 2 SchKG), the debt enforcement becomes invalid but continues to appear in the debt enforcement statement. The legal remedies according to Art. 85 SchKG and Art. 85a SchKG do not apply due to the lack of interest in legal protection. Consequently, the same must apply in the event that the debtor pays the creditor directly; although the debtor can demand the cancellation of the debt collection on the basis of a direct payment to the creditor, this debt collection should continue to be listed in the debt collection register.

41 In practice, therefore, agreements whereby the debtor settles the outstanding claim while the creditor in return withdraws its debt collection (usually after receiving payment) are common.

## C. Victory with action for recovery (Art. 8a para. 3 lit. b)

42 Collections in which the debtor has successfully brought an action for recovery (Art. 86 SchKG) are also not accessible to third parties.

## D. Debt collection withdrawn (Art. 8a para. 3 lit. c)

43 Likewise, no information is to be provided on debt enforcement proceedings which the creditor has withdrawn. The reasons for the withdrawal are just as irrelevant as the time of the withdrawal, i.e. whether it took place before or after the debt was paid. It must be made clear that the creditor is not obliged (by law) to withdraw his debt collection after the debt has been paid.

44 Withdrawal is also possible simultaneously with the initiation of debt collection. In this case, the debt collection office does not issue a payment order, which is why the debt collection is not listed in the debt collection register (so-called silent debt collection). It has not been conclusively clarified whether such silent debt collection has the effect of interrupting the statute of limitations.

## E. Approved request for non-disclosure of the debt collection (Art. 8a para. 3 lit. d)

### 1. Direction of the 2019 revision

45 Since debt collection proceedings listed in the debt collection register extract can lead to serious disadvantages for the person concerned, especially in tight market conditions (e.g. in the housing market), there has been repeated criticism in recent years of the legal situation, which is disadvantageous for unjustified debt collectors. Specifically, the hurdles to make unjustified debt collection no longer visible to third parties were criticized as being too high. In fact, prior to the 2019 revision, the (unjustified) debtor had to either prevail in - typically costly - court proceedings (cf. Art. 8a para. 3 lit. a and b SchKG) or hope for a concession from the (alleged) creditor (Art. 8a para. 3 lit. c SchKG)

if he wanted to have a debt collection removed from the debt collection register extract.

Against this backdrop, the 2019 revision of Art. 8a para. 3 lit. d SchKG provided business owners with a new instrument to have unjustified payment orders deleted from their debt collection register more quickly and cost-effectively. According to the legislative materials, unjustified debt collection orders were not limited to actual vexatious debt collection, but generally included debt collection orders for fully or partially disputed claims in which the alleged creditor did not remove the legal proposal. 46

Specifically, Art. 8a para. 3 lit. d SchKG now stipulates that debt collection offices do not inform third parties of debt collection proceedings against which a legal proposal has been made if the debtor submits a request for non-disclosure and the (alleged) creditor subsequently fails to prove within 20 days that he has initiated proceedings to eliminate the legal proposal. Thus, the SchKG now provides for a procedure in which the (non-)justification of a debt collection is to be concluded from formal criteria, in particular from the behavior of the parties, without a substantive examination of the claim. 47

The justification of a debt collection determined in this way in no way represents a final assessment. The substantive examination of the debt enforced and the associated assessment of whether its enforcement was justified is carried out solely by the courts responsible for this. 48

## 2. The procedure pursuant to Art. 8a para. 3 lit. d SchKG

### a. Scope of application of Art. 8a para. 3 lit. d SchKG

In order for the procedure under Art. 8a para. 3 lit. d SchKG to apply at all, the debtor must have raised a legal objection. This restriction is justified by the fact that a debtor who does not raise a legal objection thereby expresses that the debt collection is justified. The same must be the case if the debtor withdraws the legal proposal that has been made. 49

Even if this consideration is often correct, it must be borne in mind that legal laypersons in particular are not always able to correctly assess the scope of the legal proposal for the debt collection proceedings and may, under certain circumstances, imprudently not raise a legal proposal or withdraw it. Certain debtors take advantage of this lack of knowledge and put additional pressure 50 on the (alleged) debtor not to file a legal proposal or to withdraw the legal proposal already filed. Therefore, it is not always possible to conclude that the debt collection is justified from an omitted or withdrawn legal proposal. Nevertheless, Art. 8a para. 3 lit. d SchKG in its current version does not provide a basis for non-notification of the debt collection in the case of a withdrawn or omitted legal proposal.

51 A similar problem arises with the excessive (collection) fees frequently encountered in practice. As a result, debtors (rightly) see themselves obliged to make a partial legal proposal to the extent of the fees, even in the case of claims that are basically justified. However, under Art. 8a para. 3 lit. d SchKG, a partial legal proposal has the same effect as a completely omitted legal proposal and is therefore of no help to the party in possession. Here too, Art. 8a para. 3 lit. d SchKG is only a partially satisfactory solution.

52 Nor is Art. 8a para. 3 lit. d SchKG available to the debtor if he has paid the debt or part of it. If payment is made to the debt enforcement office, the latter knows about it anyway. If, on the other hand, the payment is made directly to the creditor, it is the creditor's responsibility to inform the debt collection office accordingly, provided that the creditor has an interest in the disclosure of the debt collection. In this case, the creditor must be expected to substantiate the direct payment with documents - simple assertion is not sufficient.

53 If an earlier application for non-disclosure was approved but the claim was subsequently paid, the debt collection must be made available for inspection again - admittedly with the note "paid". The only exception is if the claim has already been paid prior to the initiation of the debt collection, since in this case it is an unjustified debt collection.

### b. Request of the debtor

54 If the debtor has made a legal proposal for the entire debt and has subsequently not paid the debt either in full or in part, he may submit a request for non-disclosure three months after service of the order for payment. The three-month period is calculated in accordance with Art. 31 SchKG in conjunction with Art. 142 Para. Art. 142 para. 2 CPC.

55 The request must be addressed to the debt enforcement office. The debtor is free to use the sample form provided for this purpose. In any case, the request must state the party making the request, the debt collection concerned and, if

applicable, the claim concerned in a debt collection (if a debt collection comprises several claims), as well as the wish that the debt collection concerned cannot be viewed by third parties in the future. The request may also be made orally.

According to the case law of the Federal Supreme Court, which will be discussed in detail below, a request for non-disclosure made after the one-year deadline pursuant to Art. 88 para. 2 SchKG must be rejected. In fact, the debtor must submit his request at the latest 20 days before the expiry of the one-year period pursuant to Art. 88 para. 2 SchKG, since according to the Federal Supreme Court the presumed creditor must have sufficient time, i.e. (arguably) the full 20 days, for a "reaction". It is unclear whether the debtor must also take into account the processing and forwarding time of the debt collection office. 56

The Federal Supreme Court essentially justifies its practice with reference to the parliamentary deliberations, according to which the "inactivity" of the creditor after service of the order for payment should constitute the essential criterion for granting a request for non-notification of the debt collection. After the expiration of the time limit of Art. 88 para. 2 SchKG (and the lapse of the debt collection), the creditor could no longer react. Therefore, the procedure according to Art. 8a para. 3 lit. d SchKG is not suitable under these circumstances to distinguish between justified and unjustified debt collection. In our opinion, this reasoning is not convincing for several reasons: 57

- The argument that the (alleged) creditor no longer has the possibility to react is therefore not valid because he can effortlessly put the same claim into collection again and thus ensure that it continues to appear or appears again in the collection register extract of the debtor. If the creditor is really interested in enforcing his claim, he will have to initiate a new debt collection after the debt collection lapses. In this case, the debtor is even confronted with two debt collection proceedings for the same claim, without being able to ensure non-disclosure of the lapsed debt collection proceedings with a simple request. In contrast, a legal action to clear up the debt collection register is a lengthy and costly process.
- Moreover, at the time the debt collection lapses, the creditor has already had about one year to initiate proceedings to eliminate the legal proposal. If he fails to do so, the conclusion is obvious that the debt collection is un-

justified. This consequence also corresponds to the legislator's idea, according to which debt enforcement proceedings that are not continued are deemed to be unfounded.

- If then the distinction between justified and unjustified debt collection should be based on the creditor's inactivity, it is not clear why setting a deadline for the creditor to prove the (timely) initiation of proceedings for the elimination of the legal proposal after the expiry of the deadline pursuant to Art. 88 para. 2 SchKG should be less suitable than before. Firstly, in practice, the debt collection office often does not even know whether the period pursuant to Art. 88 para. 2 SchKG has expired without corresponding proof from the creditor. Secondly, this period may also expire although the creditor has not remained inactive. And thirdly, even after the expiry of the time limit, the creditor can still initiate proceedings to remove the legal proposal, in which case the proceedings have not been initiated in time (and are futile in substance). Proof by the creditor is therefore also necessary in order to be able to assess at all whether the time limit under Art. 88 para. 2 SchKG has expired and any proceedings have been initiated in due time. If there is no such proof, the debt collection is no longer to be disclosed on the basis of Art. 8a para. 3 lit. d SchKG. There is no reason to assess the creditor's inactivity before and after the expiry of the time limit pursuant to Art. 88 para. 2 SchKG differently. For in one case as in the other, it is clear that the creditor remained inactive (for too long), whereby the decisive criterion for identifying unjustified debt collection is fulfilled according to the Federal Supreme Court.
- The view taken by the Federal Supreme Court, according to which the creditor's inactivity only leads to non-disclosure of the debt collection if the creditor still has the possibility to prove the initiation of (not futile) proceedings within 20 days from the request, can neither be based on the wording of the law nor on the materials and contradicts the legislative intention. From the point of view of the debtor, it should not be obvious that his request for non-disclosure is protected if the creditor has waited 3 or 11 months from service of the order for payment before initiating proceedings, but not if the creditor has remained inactive for 12 months.

58 Correctly, a request for non-disclosure should therefore also be approved after the expiry of the one-year period pursuant to Art. 88 para. 2 SchKG if the creditor has remained inactive until that time. The only time limit is Art. 8a

para. 4 SchKG: Since debt collection proceedings are no longer listed in the debt collection register extract after five years anyway, the debtor has no legal interest in a request for non-disclosure from this point on.

### c. Notification of the creditor by the debt collection office

If the debt collection office is aware at the time of receipt of the request for non-disclosure that the creditor has already initiated proceedings for the elimination of the legal proposal, it shall reject the request without further ado. If the Office is not aware of such proceedings, it shall immediately request the creditor to provide the relevant evidence. For this request, the Office shall use the form provided for this purpose "Notification to the creditor concerning a request for non-disclosure of an enforcement action". 59

### d. Proof by the creditor

Following the request by the debt collection office, the creditor has 20 days to prove that proceedings to eliminate the legal proposal were initiated in good time. If no notification is received from the creditor within this period, the debt collection office will accept the request of the debtor and will no longer bring the debt collection to the attention of third parties (or will no longer list the debt collection in the extract from the debt collection register). The Office informs the debtor that its application has been approved. 60

The "proceedings for the elimination of the legal proposal" are deemed to be both the action for recognition under Art. 79 SchKG and proceedings for the opening of legal proceedings under Art. 80 or 82 SchKG. Art. 8a para. 3 lit. d SchKG states that one of these proceedings must be "initiated" by the creditor. Thus, the creditor only has to prove the initiation of such proceedings. According to the case law of the Federal Supreme Court, the creditor satisfies this requirement even if he is unsuccessful in the legal opening proceedings initiated by him (i.e. if, for example, his request for legal opening is rejected or not accepted). According to the Federal Supreme Court, the creditor proves the "seriousness" of the debt collection by initiating proceedings for the elimination of the legal proposal, which is sufficient for further notification of the debt collection. In other words, if the creditor has not initiated any proceedings to eliminate the legal proposal, the debtor's request for non-disclosure must be approved; if, on the other hand, the creditor has initiated such pro- 61 ceedings and has been unsuccessful, the request for non-disclosure must be rejected.

62 In our opinion, the practice of the Federal Supreme Court is not convincing in this context either and has been rightly criticized in the doctrine.

- The Federal Supreme Court already starts from the wrong premise, according to which Art. 8a para. 3 lit. d SchKG is about determining the "seriousness" of a debt collection. However, how "serious" a creditor is in pursuing his (alleged) claim has never been an issue in the legislative process. Rather, it was always a matter of using simple, formal criteria to distinguish unjustified debt collection from justified debt collection.
- It is true that the creditor's action was discussed in the parliamentary deliberations as a starting point for this distinction and was subsequently reflected in the wording of the law. The inactivity of the creditor for three months (and 20 days) was considered by the legislator as sufficient indication that a debt collection is presumably unjustified. Behind this assessment is also the recognition that a payment order with a legal proposal is of no use to the creditor and that he must appeal to the court to collect his claim. However, if a debt collection is already considered to be presumptively unjustified if it has not been examined by the court due to the creditor's inactivity, this must apply all the more to a debt collection that cannot be continued after examination by the court. Whereas the dismissal of an action for debt forfeiture directly proves the non-existence of a claim (and leads to the non-notification of the debt collection), this is not equally the case in the event of a defeat in the proceedings for the opening of a legal action (or in the event of a failure to respond to an action for debt forfeiture). However, a defeat in the legal opening proceedings is nevertheless an indication that the debt collection is unjustified. Accordingly, in the opinion expressed here, it would be more in line with the purpose of the provision and the legislative intentions if a request for non-disclosure of the debt enforcement proceedings were granted even after the creditor had been unsuccessful in the proceedings to initiate the legal proceedings.
- In this case, the creditor would still have the possibility to prove within the period of 20 days that he has initiated new proceedings for the elimination of the legal proposal in the relevant debt collection. Only if the creditor succeeds in proving this, is there any prospect at all that the legal proposal

in the debt collection in question will still be eliminated. And only under these circumstances is it justified to continue to bring the debt collection to the attention of third parties. Otherwise, the debtor who has successfully defended his legal proposal would be treated worse than the debtor who has not yet had to defend his legal proposal at all.

- Contrary to the considerations of the Federal Supreme Court, the wording of Art. 8a para. 3 lit. d SchKG does not stand in the way of a more liberal practice: The initiation of proceedings mentioned in the law is merely the temporal connecting factor that determines the point in time from which a request for non-disclosure must be rejected. If the legislator had instead referred to the point in time - which is actually relevant for the distinction between unjustified and justified debt collection - when the legal proposal is eliminated, the debtor could have requested that the debt collection in question not be disclosed during the procedure for eliminating the legal proposal - which would have diluted the informative value of the extract from the debt collection register. However, for the aforementioned reasons, it cannot be concluded from this that under Art. 8a para. 3 lit. d SchKG the mere initiation of a corresponding procedure is sufficient in any case.

Despite the criticism in the doctrine, it cannot be assumed that the Federal 63 Supreme Court will return to its (officially published) case law in the foreseeable future. For the time being, therefore, it is sufficient for the alleged creditor to initiate legal proceedings - irrespective of the outcome of the proceedings. Against the background of this practice, the initiation of conciliation proceedings should also be sufficient, even if the creditor subsequently allows the authorization to sue to lapse by not filing suit within three months.

If, on the other hand, a request for conciliation is withdrawn if the claimant 64 fails to appear at the conciliation hearing, the period of three months pursuant to Art. 8a para. 3 lit. d SchKG should, according to cantonal practice, start running again when the conciliation proceedings are written off. The creditor is free to file a second request for conciliation, provided that he has withdrawn the first one with a corresponding reservation of reinstatement. In this case, the new request for conciliation again initiates proceedings for the elimination of the legal proposal.

65 Insofar as the creditor wishes to provide evidence of the timely initiation of proceedings with reference to an action for recognition pursuant to Art. 79 SchKG, the following should be noted: An action for recognition exists only if, in addition to the request for payment, an application is also made for the elimination of the legal proposal in a specific debt collection. Accordingly, an action for recognition or a request for conciliation only initiate "proceedings for the elimination of the legal proposal" if the creditor has expressly requested the elimination of the legal proposal. An exception to this principle can only be made if the creditor is unable to request the elimination of the advance in title - for example, because he has to sue for the debt in question before a foreign court or an arbitral tribunal. Likewise, the creditor cannot be required to file a request for the elimination of the advance on the right if he filed the action before the debt collection was lifted or before the advance on the right was filed and an amendment of the action is no longer (or not yet) permissible under civil procedure.

66 The proof of the timely initiation of proceedings for the removal of the preliminary injunction may be shown in particular by a notice of posting or receipt of the request for the opening of proceedings or of the action for recognition. If the creditor sends such proof to the Office, the debt enforcement proceedings shall continue to be brought to the attention of third parties or shall be brought to their attention again. If the creditor notifies the Office during the 20-day period, it shall also lead to the rejection of the debtor's application.

### 3. Parliamentary Initiatives in Response to the Federal Supreme Court Case Law

67 As already mentioned, the two rulings of the Federal Supreme Court, according to which requests for non-disclosure are to be rejected if the time limit pursuant to Art. 88 para. 2 SchKG has expired or if the creditor has been unsuccessful in the legal opening proceedings, have (rightly) met with criticism in the doctrine. In view of the restrictive interpretation of Art. 8a para. 3 lit. d SchKG by the Federal Supreme Court, it is hardly surprising that the legislator reacted promptly: In response to the two rulings, the Legal Commission of the National Council decided in January 2022 to submit two parliamentary initiatives aimed at correcting them (Parliamentary Initiatives 22.400 and 22.401). Thus, it is to be clarified in the text of the law that a request for non-disclo-

sure is to be granted even if the deadline pursuant to Art. 88 para. 2 SchKG has expired or if the creditor's request for the elimination of the legal preliminary ruling is not granted or his request is definitively rejected. The Legal Commission of the Council of States has approved both initiatives, and the Legal Commission of the National Council is currently drafting a bill.

## VI. TEMPORAL LIMITS

The right of inspection of third parties expires five years after the conclusion of the proceedings (Art. 8a para. 4 SchKG). In this context, not only a formally terminated debt collection is deemed to be concluded, but also any debt collection that cannot be continued by an ordinary request of the creditor. The wording of the law makes it clear that this time limit only concerns the right of inspection of "third parties". The right of inspection of the former parties to the concluded debt enforcement or bankruptcy proceedings is just as unaffected by this as that of the authorities and that of the person concerned himself. Their right of inspection can only be limited by the fact that the requested files no longer exist. 68

A special time limit then applies to open loss certificates: It follows from the possibility of deleting certificates of loss pursuant to Art. 149a SchKG that the right of inspection of third parties remains in force until the time of deletion. 69

## VII. COSTS

The costs for the individual administrative acts are regulated in the Fee Ordinance to the SchKG (GebV SchKG). The following special features must be noted: 70

- Pursuant to Art. 12b GebV, the fee for the request for non-disclosure pursuant to Art. 8a para. 3 lit. d SchKG is a flat rate of CHF 40. These costs are to be borne by the applicant - regardless of the fate of the request or the debt collection in question. The requested office may make the processing of the application dependent on the advance payment of the CHF 40.
- For the persons involved in debt enforcement or bankruptcy proceedings, the inspection of files is free of charge.

- Information to court and administrative authorities is also subject to a fee, unless federal law provides for an exception (cf. Art. 12a para. 3 GebV SchKG).

## VIII. APPEALS

71 If an applicant creditor is refused inspection, he may appeal against the decision in accordance with Art. 17 SchKG. Decisions of the last cantonal instances may be appealed to the Federal Supreme Court pursuant to Art. 72 para. 2 lit. a BGG. On the other hand, the creditor has no right of appeal if the debtor has successfully obtained non-disclosure of the debt collection pursuant to Art. 8a para. 3 lit. d SchKG. This is because the creditor is neither a party to the proceedings for non-disclosure of the debt collection nor is he entitled to have his debt collection listed in the debt collection register.

72 The debtor, on the other hand, can challenge a negative decision regarding his application for non-disclosure of a debt collection by filing an appeal under Art. 17 SchKG. In contrast, he has no legal remedy against an unjustly granted inspection. There is no practical procedural purpose here, since the wrongfully granted information cannot be reversed. At most, a state liability according to Art. 5 SchKG comes into question.

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COMMENTARY ON

# Art. 89 DEBA

A commentary by Selim Marasco-Keller

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**Title Three Debt Enforcement by Distraint**

**I. Distraint**

**A. Execution**

**1. Time**

**Art. 89**

Where the debtor is subject to debt enforcement by distraint, the debt enforcement office, on receipt of the application for continuation, must immediately distrain the assets or have them distrained by the debt enforcement office at the place where the assets to be distrained are located.

# CONTENT

## I. PREREQUISITES FOR ATTACHMENT

In order for an attachment to take place in accordance with Art. 89 f. DEBA, the following **prerequisites** must be met: 1

(i) The debtor must be subject to debt enforcement proceedings. If the debtor is subject to bankruptcy proceedings and the debt enforcement proceedings are nevertheless carried out, the attachment is void. If enforcement proceedings for attachment are initiated for a claim secured by a pledge, the debtor may lodge an appeal (Art. 17 DEBA) requesting that the creditor first make use of the pledge (Art. 41 para. $1^{bis}$ DEBA; known as "beneficium excussionis realis").

(ii) A creditor submits a request for continuation in due time and form (cf. Art. 88 DEBA).

## II. TIME OF ATTACHMENT

According to the wording of the law, the attachment must be carried out "*without delay*." This provision is a procedural rule. A violation of this provision, for example due to delayed action by the debt enforcement office, has no effect on the legality of the attachment proceedings. 2

In practice, if the debt enforcement office delays action, the creditor's only recourse is to file a complaint for delay (Art. 17 DEBA) and, if applicable, a claim for state liability (Art. 5 DEBA). 3

The creditor has no influence on the time of the seizure. A request to postpone the attachment to a later date specified by the creditor is not permitted. 4

## II. JURISDICTION (IN PARTICULAR, LOCATION OF ASSETS)

### A. General

The debt enforcement office at the place of enforcement is responsible for ordering the attachment (Art. 46 ff. DEBA). 5

The debt enforcement office at the **location** of the assets to be seized is responsible for executing the seizure. If assets are located outside the jurisdic- 6 tion of the debt enforcement office at the place of enforcement, the competent office must request legal assistance from the debt enforcement office at the relevant location in order to carry out the seizure (so-called requisition seizure; Art. 4 DEBA).

7 The provision on the execution of seizure (Art. 275 DEBA) does not explicitly refer to Art. 89 DEBA in its current version. Nevertheless, Art. 89 DEBA is also applicable mutatis mutandis to the execution of seizure. The planned amendment to Art. 275 DEBA, which inserts a reference to Art. 89 DEBA, will codify this case law.

8 This order of jurisdiction is mandatory. A seizure by an office that does not have jurisdiction is null and void.

9 Only assets in Switzerland can be seized, not those abroad. Under certain circumstances, however, a mandatory claim for the transfer of ownership of foreign assets may be seized (e.g., a claim for the surrender of securities held abroad).

## B. Location of different assets

10 **Movable property:** Seizure takes place at the location where the item is physically located.

11 **Claims against debtors domiciled in Switzerland**: Claims against debtors domiciled in Switzerland that are not secured by securities are deemed to be located at the domicile of the debtor (as the creditor of the corresponding claim). In all cases, a claim attachment can be enforced by the debt enforcement office at the (ordinary or special) place of enforcement. This remains the case even if the enforcement debtor moves after the attachment has been announced (Art. 53 DEBA). A seizure by way of legal assistance is not necessary.

12 In special cases, namely in the case of wage claims, the debt enforcement office at the place of enforcement may also request the debt enforcement office at the place of residence of the judgment debtor to carry out the attachment if the place of residence and the place of enforcement are different and further clarifications are necessary in the context of enforcement.

13 **Claims against debtors residing abroad**: Claims against debtors residing abroad are deemed to be located at the third-party debtor's place of residence in Switzerland. The claim is also deemed to be located at the Swiss

place of residence of the third-party debtor if it belongs to the foreign branch of this third-party debtor. Actual involvement of the Swiss third-party debtor in the customer relationship between the foreign branch and the foreign enforcement debtor is not a prerequisite for attachment.

**Claims of joint and several creditors**: Claims of joint creditors (e.g., joint accounts) may be seized by each individual joint creditor for payment of the entire amount. Each of these claims therefore has its own place of location at the domicile of the judgment debtor or, if the judgment debtor is domiciled abroad, at the registered office of the third-party debtor. 14

**Securities:** Claims embodied in securities must be seized where they are physically located. This also applies if the security is pledged. 15

**Real estate**: The debt enforcement office at the location of the property is responsible. If a property is located in several debt enforcement districts, the office responsible is the one in whose territory the more valuable part is located (Art. 24 para. 1 VZG). 16

**Intellectual property rights:** Intellectual property rights must be seized at the place of residence of the judgment debtor. If the judgment debtor is resident abroad, intellectual property rights entered in a register are seized at the location of the Swiss register (i.e., at the headquarters of the Swiss Federal Institute of Intellectual Property (IGE) in Bern). 17

**Cryptocurrencies**: Cryptocurrencies are intangible assets. Like claims, cryptocurrencies can therefore only be located in a fictitious sense. If the judgment debtor is domiciled in Switzerland, the place of location is therefore generally considered to be the domicile of the judgment debtor. This principle applies as long as the seizure of cryptocurrencies does not require any official acts that only the foreign debt enforcement office is authorized to perform (i.e., only inquiries by letter and telephone are necessary and no seizure of hardware is required). If the judgment debtor is not resident in Switzerland, the location of the cryptocurrency is the place where the cryptocurrency can actually be accessed. This is possible, for example, at the registered office of the private key holder if the latter can be instructed to hand over the private key (as is regularly the case with the practically important payment tokens Bitcoin and Ether). Depending on the technical design of the system, other access options (and thus locations) are conceivable (e.g., via an admin key or via central administration of "permissioned distributed ledger systems"). For a lo- 18 cation to be considered the location of the cryptocurrency, it is sufficient if actual access to the cryptocurrency is possible in some form at this location.

19 **Book-entry securities:** The attachment takes place exclusively at the location of the custodian that manages the securities account of the account holder to whom the book-entry securities are credited (Art. 14 para. 1 BEG).

20 **Share rights:** The debt enforcement office at the debtor's place of residence is responsible for the attachment of share rights (i.e., e.g., assets of an undivided estate or a general partnership; see Art. 1 VVAG) (Art. 2 VVAG).

21 **Ships:** Registered ships are to be seized at the location of the ship register (Art. 55 para. 2 Federal Act on the Ship Register). Foreign ships may be seized at their actual location.

22 **Aircraft:** Aircraft are to be seized at the place of residence of the owner entered in the aircraft register (Art. 53 Federal Act on the Aircraft Register). Foreign aircraft may be seized at their actual location (Art. 54 Federal Act on the Aircraft Register).

## III. ENFORCEMENT

23 The attachment takes effect from the **time** at which it was enforced. The attachment is deemed to have been enforced as soon as the debt enforcement office informs the debtor that the assets have been officially seized and that the debtor may no longer dispose of them, with reference to the penalties under Art. 169 of the SCC. If the debtor is not present, the attachment only takes effect upon delivery of the attachment document.

24 The attachment declaration must sufficiently identify the attached assets. An insufficiently precise description may render the attachment declaration null and void.

25 The attachment declaration may be made verbally, in writing (Art. 34 DEBA) or by public announcement (Art. 35 DEBA). As a rule, the debt enforcement office will notify the debtor of the attachment declaration using sample form 6/6a.

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COMMENTARY ON

# Art. 90 DEBA

A commentary by Selim Marasco-Keller

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**2. Notice**

**Art. 90**

The debtor shall be notified of the distraint proceedings on the preceding day at the latest, with reference being made to Article 91.

# CONTENT

## I. SCOPE OF APPLICATION

In addition to the ordinary attachment procedure, a **notice of attachment** is also required in the case of a provisional attachment (Art. 83 DEBA), a supplementary attachment (Art. 110 DEBA) or a subsequent attachment (Art. 145 DEBA). No notice is required for the execution of an arrest or for the retention list. 1

## II. TIME

Notice of attachment must be given on the **day before**, but not necessarily 24 hours in advance. Notice must be given during the debt enforcement office's opening hours, and the debt enforcement office must observe any blocking periods and any legal standstill. 2

The time of the attachment must be specified in the attachment document. According to the prevailing opinion, it is sufficient to state the date and whether the attachment will take place in the morning or afternoon (without specifying the exact time). If the debt enforcement office notifies the debtor of the attachment, this notification may, instead of specifying the exact date and time of the attachment on site, also contain a request that the debtor appear in person at the debt enforcement office by a certain time. 3

Failure to give timely notice renders the seizure contestable and may be challenged by means of an appeal (Art. 17 DEBA) against the seizure document. A defective seizure notice can only be remedied if the debtor was able to participate in the seizure or be represented at the seizure. 4

## III. PRECAUTIONARY MEASURES

Precautionary measures (see Art. 98 ff. DEBA) are permissible in **urgent cases** even before the seizure notice (and also during closed periods, debt collection holidays, and legal standstill). 5

## IV. SERVICE

The seizure notice is an order whose service is determined in accordance with the provisions of Art. 34 f. DEBA. 6

7 The request for continuation generally marks the beginning of a new stage in the proceedings. According to the prevailing doctrine, the so-called **deemed service** – whereby an uncollected item is nevertheless deemed to have been delivered for the purposes of meeting the deadline – does not apply to the service of the attachment notice.

8 In the opinion of the Federal Supreme Court, however, the fiction of service does apply in principle to the attachment notice if the debtor has not lodged an objection and therefore had to expect the proceedings to continue. The Federal Supreme Court justifies this on the grounds that (unlike in the case of legal enforcement proceedings or notification of bankruptcy proceedings) there is no change in jurisdiction and the proceedings continue to be conducted by the debt enforcement office.

9 The situation is unclear in the case of a legal objection that has been raised and overturned in legal enforcement proceedings. According to the opinion expressed here, even in these cases, the service of the attachment notice is to be assumed to have been effected, as the debtor must expect that a creditor will continue the debt enforcement proceedings after the successful conclusion of a debt enforcement proceedings. It is also conceivable that there may be cases in which the debtor already had to expect service for other reasons and the service is therefore deemed to have been effected.

10 If the debtor refuses to accept the notice, this does not prevent the garnishment notice from taking effect.

11 The addressee of the garnishment notice is determined (even if it is not an actual enforcement document) in accordance with Art. 64-66 DEBA.

12 The garnishment notice is issued using official form no. 5. The creditor is not required to attend the attachment.

## V. EFFECTS OF THE ATTACHMENT NOTICE

13 The attachment notice does not yet restrict the debtor's power of disposal (cf. Art. 96 para. 1 DEBA). However, the debtor may not **frustrate** the impending attachment. Such conduct may give rise to criminal prosecution (in particular, possible attachment fraud (Art. 163 SCC) or damage to creditors through reduction of assets (Art. 164 SCC)) or to the opening of bankruptcy proceedings pursuant to Art. 190 no. 1 DEBA.

Service of the attachment notice means that the place of enforcement remains unchanged even after a change of residence (Art. 53 DEBA). 14

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COMMENTARY ON

# Art. 91 DEBA

A commentary by Selim Marasco-Keller

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**3. Duties of the debtor and third parties**

**Art. 91**

[1] The debtor is obliged, subject to criminal penalties for failing to do so:

to attend the distraint proceedings or be represented during the same (Art. 323 para. 1 SCC);
to disclose his assets, including those not in his custody, as well as his claims and rights against third parties, to the extent that this is necessary for sufficient distraint (Arts 163 no 1 and 323 no 2 SCC).

[2] If the debtor fails to attend the distraint without sufficient excuse and does not allow himself to be represented, the debt enforcement office may have him brought to the proceedings by the police.

[3] The debtor must open premises and containers to the officer on request. The official may use police powers if necessary.

[4] Third parties who hold the debtor's assets in safekeeping or with whom the debtor has assets are obliged to provide information to the same extent as the debtor, subject to criminal penalties for failing to do so (Art. 324 para. 5 SCC).

[5] Authorities are obliged to provide information to the same extent as the debtor.

[6] The debt enforcement office shall expressly draw the attention of the persons concerned to their obligations and to the penalties for failing to meet the same

# CONTENT

# I. SCOPE OF APPLICATION

1 Art. 91 DEBA specifies the **obligations** of debtors and third parties in the context of attachment. The debt enforcement office shall draw the attention of the parties concerned to these obligations, warning them of the penalties that may be imposed (Art. 91 para. 6 DEBA). A corresponding note can be found in sample form no. 5 for the attachment notice. The threat of criminal penalties is an objective condition for criminal liability, i.e., without the threat, there is no penalty.

2 Art. 91 DEBA also applies outside of attachment to provisional attachment, supplementary attachment (Art. 110 para. 1 DEBA) and subsequent attachment (Art. 115 para. 3 and Art. 145 DEBA). Furthermore, Art. 91 DEBA also applies *by analogy* to seizure (Art. 275 DEBA), retention (Art. 283 DEBA) and the inventory of assets under bankruptcy law (Art. 163 para. 2 DEBA).

# II. OBLIGATIONS OF THE DEBTOR

## A. Obligation to be present (Art. 91 para. 1 no. 1 DEBA)

3 The debtor must be **present** during the execution of the attachment or be **represented** (Art. 91 para. 1 no. 1 DEBA). Violation of this obligation is punishable by a fine (Art. 323 no. 1 SCC).

4 Persons who are authorized to receive a debt enforcement document pursuant to Art. 64 ff. DEBA may represent the debtor without power of attorney. The debtor is free to grant power of attorney to additional representatives (Art. 27 para. 1 DEBA).

5 If the representative is unable to provide the debt enforcement office with relevant information (e.g., because the representative is not aware of details regarding the debtor's assets), the debt enforcement office is not required to deal with the representative and may contact the debtor directly.

6 If the debtor is temporarily absent, the debt enforcement office must clarify whether the debtor can be represented. Seizure in absentia is also possible (for seizure in absentia, see N. 9 below).

The debtor's obligation to be present also means that they must appear at the office or at the location designated by the debt enforcement office. Failure to appear at the debt enforcement office is also punishable by law. 7

Debtors who are absent from the seizure without excuse and do not arrange for representation may be brought before the court by the police (Art. 91 para. 2 DEBA). The debt enforcement office decides at its discretion whether this is necessary. In doing so, the debt enforcement office must observe the principle of proportionality. 8

A debtor who has been duly notified of the attachment cannot prevent the attachment by being absent. However, in the absence of the debtor, the attachment only takes effect upon delivery of the attachment document (OK-Marasco-Keller, Art. 89 DEBA N. 23). 9

## B. Duty to provide information (Art. 91 para. 1 no. 2 DEBA)

### 1. Principle: Comprehensive duty to provide information

The debtor must provide information about his assets in the event of attachment, insofar as this is necessary for a sufficient attachment (Art. 91 para. 1 no. 2 DEBA). Violation of this obligation is punishable under Art. 163 no. 1 SCC and Art. 323 no. 2 SCC. 10

The purpose of the **duty to provide information** is to ensure that the debt enforcement office receives the information it needs to carry out the seizure. Without the relevant information from the debtor, the debt enforcement office cannot know whether and where assets are available. Only after the duty to provide information has been fulfilled can the debt enforcement office carry out its tasks in the attachment and, in particular, determine the attachable assets (Art. 92-94 DEBA), estimate the value of the assets (Art. 97 DEBA), and determine the order of attachment (Art. 95-95a DEBA). 11

The duty to provide information is, in principle, **comprehensive**. It is not up to the debtor to decide whether and which assets can be seized and in what order. This decision is solely at the discretion of the debt enforcement office. The debt enforcement office must proceed in accordance with Art. 95 DEBA. The debtor cannot effectively preempt the office's decision by providing insufficient information. The intrusion into personal privacy associated with the duty to provide information must be accepted. 12

13 Until the attachment was enforced, the debtor had the opportunity to settle the claim and to realize the assets at his discretion. In addition, he can still stop the debt enforcement by making payment (Art. 12 DEBA). Accordingly, there is no justification for limiting the obligation to provide information to individual assets only. The Federal Supreme Court therefore rightly assumes that the obligation to provide information applies comprehensively.

### 2. Subject matter of the obligation to provide information

14 **In terms of content**, the debtor has a comprehensive obligation to provide information about his movable and immovable assets. In addition to information on the extent of the assets, this also includes their location. The duty to provide information also covers assets held by third parties (e.g., bank accounts and securities deposits) and abroad.

15 The comprehensive duty to provide information means that questions about the debtor's personal circumstances (e.g., marital status, place of residence) are also permitted, provided that they relate to the debtor's financial circumstances or allow conclusions to be drawn about them. The specific permissible content of such questions is determined on a case-by-case basis.

16 In **terms of time**, the obligation to provide information relates to the financial circumstances at the time of the attachment. It also covers transactions that took place during the period of suspicion for Paulian claims under Art. 286 to 288 DEBA (**i.e. up to 5 years back**). The debt enforcement office does not need to demonstrate any particular urgency for information during the period of suspicion, nor does it need to prove any suspicion of potentially contestable transactions.

### 3. Limits of the duty to provide information

17 There is a **time limit** in that the debt enforcement office cannot request information about transactions that took place more than five years ago.

18 There is generally no obligation to provide information on circumstances after the date of the attachment. Exceptions exist in the context of wage garnishment, where the debtor may be obliged to report changes of employment and income, as well as in the case of a supplementary attachment (Art. 110 para. 1 DEBA), an adjustment to current circumstances (Art. 93 para. 3 DEBA)

or a subsequent attachment (Art. 115 para. 3 DEBA), which give rise to a renewed obligation to provide information.

Some legal scholars argue that the obligation to provide information can be limited in terms of content if the debtor discloses sufficient movable assets to the debt enforcement office to cover the claim. This view cannot be accepted, as the decision on which assets to garnish rests with the debt enforcement office and not with the debtor (see above, N. 12). 19

For purely practical reasons, however, exceptions may be justified in individual cases if, for example, there are sufficient immediately liquid assets and these are disclosed by the debtor, so that no information on other assets (e.g., immovable property) is necessary. However, the decision as to what information is obtained is also the responsibility of the debt enforcement office and not the debtor. 20

### 4. Consequences of violating the duty to provide information

A violation of the duty to provide information leads to **criminal liability** under Art. 323 no. 2 of the SCC (disobedience of the debtor) or Art. 163 no. 1 of the SCC (seizure fraud). In addition, the creditor may apply for the opening of bankruptcy proceedings in accordance with Art. 190 para. 1 no. 1 DEBA. 21

## C. Obligation to open premises and containers (Art. 91 para. 3 DEBA)

The debtor is obliged to open premises and containers at the request of the debt enforcement office (Art. 91 para. 3 sentence 1 DEBA; so-called “duty of disclosure”). If the debtor refuses to comply with this **duty of disclosure**, the debt enforcement office may immediately (i.e., without further court order) call on the police. 22

If a debtor does not grant the debt enforcement office access to their home despite being present during the seizure, it is lawful for the police to call a locksmith and forcibly open the door. The same applies if the debtor is absent without excuse. 23

## III. OBLIGATIONS OF THIRD PARTIES, IN PARTICULAR BANKS (ART. 91 PARA. 4 DEBA)

24 Third parties who hold the debtor's assets or with whom the debtor has credit balances are required to provide the debt enforcement office with the same information as the debtor (Art. 91 para. 4 DEBA).

25 The term "third party" is to be interpreted broadly. It also includes persons bound by professional secrecy, in particular **banks** and **lawyers**. Banking or attorney-client privilege does not entitle them to refuse to provide information about the debtor's assets.

26 For the obligation to provide information to arise, the third party must hold the debtor's assets or the debtor must have a credit balance with a third party (Art. 91 para. 4 DEBA). The debt enforcement office may only oblige a third party to provide information if it suspects that the third party has the debtor's assets at its disposal. The debt enforcement office may not write to third parties without objective reason in order to chance upon the debtor's assets. This follows from the principle of proportionality, which must be observed when involving third parties in the enforcement of attachment. A debt enforcement office is not permitted to send out overly broad, standardized letters to a large number of third parties.

27 The source of the debt enforcement office's **suspicion of the debtor's assets** is irrelevant. For banks, sufficient suspicion arises, for example, from known account relationships and statements or a corresponding statement by the debtor. However, it is also sufficient for a debtor to have their place of residence or work in a location where a bank is physically present through branches or a subsidiary. This applies even if the debtor's place of residence or work is in a city where many banks are physically represented. At least if the debt enforcement office proceeds in stages in these areas (i.e., does not write to all banks at once), it does not violate the principle of proportionality.

28 A bank that is obliged to provide information on the basis of the debtor's place of residence or work in its catchment area does not have to check whether the debt enforcement office has already written to other banks. Even if such an indication is not apparent from the request for information, the bank may, according to the opinion expressed here, trust that the debt enforcement office is proceeding lawfully (i.e., proportionately).

If there is a suspicion of assets in this sense, third parties are obliged to provide information to the same extent as the debtor (Art. 91 para. 3 DEBA). Third parties must also provide **comprehensive information**, taking into account the aforementioned time and content restrictions. Therefore, only information that allows conclusions to be drawn about the debtor's financial circumstances is required and permitted, and only in relation to transactions that are no more than five years old (see above, N. 14 ff.). Information about assets that are formally held by a third party but economically belong to the debtor is therefore also permissible. A personality profile of the debtor created in the context of a credit check may not be disclosed if no conclusions about assets can be drawn from it. 29

**Lawyers** may also be requested, in the context of the enforcement of a garnishment, to provide information on whether they are in possession of assets belonging to the garnishment debtor and/or whether they are his debtors. If this is the case, the lawyers must specify exactly what type of assets are involved. In particular, they must also disclose whether they have **advance payments** and how much these amount to. According to case law, further information, in particular regarding invoicing and persons close to the debtor who settle fee claims on their behalf, is not required. 30

A breach of the duty to provide information is also punishable by law for third parties (Art. 324 SCC). For persons bound by professional secrecy, this threat of punishment is problematic insofar as providing too much information constitutes a breach of **professional secrecy** and is also punishable by law. In practice, this poses a problem in particular for banks that are confronted with requests for information: if they provide more information than is permitted under Art. 91 para. 4 DEBA, their officers or employees may be liable to prosecution for breach of banking secrecy. If, on the other hand, they do not provide all the information required under Art. 91 para. 4 DEBA, they may be liable to prosecution for disobedience in attachment proceedings. 31

## IV. DUTY OF AUTHORITIES TO PROVIDE INFORMATION (ART. 91 PARA. 5 DEBA)

Authorities are subject to the same duty to provide information as the debtor (Art. 91 para. 5 DEBA) . The term “authorities” covers **all authorities**. It does not matter whether they are federal, cantonal, or municipal authorities, or in 32 which area the authority operates. However, the debt enforcement office is not permitted to threaten sanctions against the authority concerned. If an authority refuses to provide information, the debt enforcement office must refer the matter to the disciplinary authorities.

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COMMENTARY ON

# Art. 106-109 DEBA

A commentary by Christoph Mettler

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**E. Third party claims (opposition proceedings)**

**1. Reservation and notification**

**Art. 106**

[1] If it is asserted that a third party is entitled to ownership of the attached object, to a lien or to another right which opposes the attachment or which must be taken into account in the further course of the enforcement proceedings, the debt collection office shall make a note of the third party‘s claim in the attachment document or, if the document has already been served, shall notify the parties specifically of it.

[2] Third parties may register their claims as long as the proceeds from the realization of the attached object have not yet been distributed.

³ After the realisation, the third party may assert the claims to which it is entitled under civil law in the event of theft, loss or other misappropriation of a movable item (Articles 934 and 935 of the Civil Code) or in the event of bad faith on the part of the purchaser (Articles 936 and 974 para. 3 of the Civil Code) outside the debt enforcement proceedings. For this purpose, a sale by public auction within the meaning of Article 934, paragraph 2, of the Civil Code shall also be deemed to be a sale by private treaty pursuant to Article 130 of this Act.

## 2. Enforcement

### a. In the case of exclusive custody of the debtor

### Art. 107

¹ The debtor and the creditor may dispute the third party‘s claim with the debt collection office if the claim relates to:

a movable item in the exclusive custody of the debtor;
a claim or other right, provided that the debtor‘s entitlement is more probable than that of the third party;
a piece of real estate, unless it can be derived from the land register.

² The debt collection office shall set a deadline of ten days for them to do so.

³ At the request of the debtor or the creditor, the third party shall be requested to submit its evidence to the debt collection office for inspection within the contestation period. Article 73 paragraph 2 applies mutatis mutandis.

⁴ If the third party‘s claim is not disputed, it shall be deemed to be acknowledged in the debt collection proceedings concerned.

⁵ If the claim is disputed, the debt collection office shall set the third party a period of 20 days within which he may bring an action against the disputing party to establish his claim. If the third party does not file an action, the claim shall be disregarded in the debt collection proceedings concerned.

### b. In the case of custody or joint custody of the third party

**Art. 108**

[1] The creditor and the debtor may bring an action against the third party to disqualify his claim if the claim relates to:

a movable thing in the custody or joint custody of the third party;
a claim or other right, provided that the third party's entitlement is more probable than that of the debtor;
a plot of land, provided it is shown in the land register.

[2] The debt collection office shall set a deadline of 20 days for them to do so.

[3] If no action is brought, the claim shall be deemed to have been acknowledged in the debt enforcement proceedings concerned.

[4] At the request of the creditor or the debtor, the third party shall be requested to submit its evidence to the debt collection office for inspection within the time limit for filing a claim. Article 73 paragraph 2 applies mutatis mutandis.

### c. Place of jurisdiction

**Art. 109**

[1] The following shall be filed with the court of the place of debt collection:

Actions in accordance with Article 107 paragraph 5;
actions in accordance with Article 108 paragraph 1 if the defendant is domiciled abroad.

[2] If the action under Article 108 paragraph 1 is directed against a defendant domiciled in Switzerland, it shall be filed at the defendant's domicile.

[3] If the claim relates to immovable property, the action shall in any event be filed with the court of the place where the property or its most valuable part is situated.

[4] The court shall notify the debt collection office of the receipt and settlement of the claim. ...

[5] Until the action has been settled, the debt collection proceedings in respect of the disputed items shall remain suspended and the time limits for requests for realization (Art. 116) shall stand still.

*This version of the legal text is an automatically generated machine translation of the original german version.*

# CONTENT

# I. ART. 106 SCHKG

## A. Scope of application of the opposition proceedings

In the opposition proceedings it is clarified whether a third party (claimant) has a better right (e.g. ownership, lien) to an asset that is to be realized in the execution against the debtor in favor of the creditor. Thus, in the opposition proceedings, substantive (preliminary) questions must be answered that have an impact on the compulsory execution. 1

The opposition procedure is not only applicable in the case of debt enforcement for attachment, but also in the case of attachment (Art. 275 SchKG), in the case of debt enforcement for the realization of a pledge (Art. 155 SchKG), in the case of rental retention pursuant to Art. 283 SchKG and in the case of the determination of new assets within the meaning of Art. 265a SchKG. If a limited right in rem to real property is asserted, the action for the adjustment of encumbrances pursuant to Art. 140 SchKG assumes the function of the action for opposition. The present commentary is oriented towards the standard case, i.e. the attachment pursuant to Art. 89 et seq. SchKG, but in principle also applies to the other proceedings. 2

In bankruptcy, there is no equivalent to the opposition proceedings, which is why the disputes are dealt with in different proceedings. For a third-party claim to ownership of movable property, the action for admeasurement and segregation pursuant to Art. 242 to Art. 243 SchKG assumes the function of the opposition action. If the claimant asserts a limited right in rem (e.g. a lien) on assets of the bankruptcy estate, this must be decided in the collocation proceedings. If it is asserted that the claimant and not the bankruptcy estate is the creditor of a claim, this must be decided in ordinary civil proceedings (so-called pretender dispute). 3

## B. Fundamentals

The creditor seeks to have her claim compulsorily satisfied as soon as possible. If it is not necessary, it has no interest in initiating a time-consuming and costly dispute with the claimant about its rights to an attached asset. This consideration also underlies the legislative conception: if possible, an action for opposition should not occur at all. According to Art. 95 para. 3 SchKG, the 4 debt collection office attaches assets of third parties only last. If one or more claimants file claims against different assets, the debt collection office must first seize those assets for which the claim appears least likely and lastly those for which the claim appears most likely.

5 However, the debt collection office must seize everything that is designated by the creditor as belonging to the debtor and appears necessary to satisfy the creditor (cf. Art. 97 para. 2 SchKG). In other words, the attachment is only inadmissible if the asset obviously does not belong to the debtor (and not even economically). Only in this case can the debt collection office refrain from the attachment, because it would then be contestable or even null and void. If the debt collection office refuses to seize the asset or to initiate the opposition procedure, an appeal must be lodged in accordance with Art. 17 ff. SchKG. The creditor and debtor can thus enforce the opposition proceedings.

## C. Para. 1: Scope of application of the opposition procedure

6 Paragraph 1 is the central provision of Art. 106 SchKG. It regulates the scope of application of the opposition procedure and the procedure of the debt collection office. The procedure is initiated when the claimant asserts better rights to the attached asset.

### 1. Seized asset

7 The wording of Art. 106 para. 1 SchKG is too narrow. It is not only about objects, i.e. movable property (incl. securities), but also about:

- Real property (whereby only the property claim is settled in the opposition proceedings; limited rights in rem are clarified in the encumbrance settlement proceedings pursuant to Art. 140 SchKG);
- Claims, e.g. pre-emption, repurchase or purchase rights (whereby in the case of real estate these are again examined in the encumbrance settlement procedure), insurance claims, inheritance shares or non-securitized shares;
- Intermediated securities;
- Intellectual property rights;
- Cryptocurrencies.

In short, anything that is subject to attachment can also be the subject of a third-party claim. If better rights to an unseizable asset are asserted, that right must be decided in ordinary civil proceedings (e.g., vindication action). 8

## 2. Asserted better right

The better right is a right that excludes or restrains the attachment, i.e. a right to be taken into account in the realization and distribution. Under certain circumstances, this may also be subject to third-party (property) law. 9

Typically, the claimant will assert that she is the owner (or co-owner or joint owner) of the attached property. How the right of ownership was acquired is governed by substantive law. All types of acquisition are possible, i.e., original or derivative acquisition. In particular, the claimant may claim that the debtor acquired the asset on her behalf and that ownership passed to her under Article 401 para. 3 CO. Likewise, the claimant may rely on a reservation of title within the meaning of Article 715 of the Civil Code. 10

Furthermore, the claimant can assert limited rights in rem to the attached property or the attached claim. Specifically, the following rights are involved: 11

- Lien within the meaning of Art. 884 ff. CC (most frequent case);
- Right of retention in rem according to Art. 712 of the Civil Code, Art. 895 of the Civil Code, Art. 268 ff. or Art. 299c of the Code of Obligations;
- Usufruct.

In addition, the claimant may also merely register the better rank of a right in limited rem. Further rights which may oppose the attachment are provided for in family law (e.g. Art. 68e SchKG). 12

In the case of the following claims, however, no opposition proceedings are to be initiated: 13

- If the claimant asserts a compulsory claim (e.g. for transfer of ownership): in the absence of an in rem effect, such a claim is disregarded in the realization proceedings. The situation is different if, prior to the seizure, a priority notice pursuant to Art. 960 f. CC has been made.
- If the garnishee disputes the existence of the attached claim (e.g. because it has been lost through set-off). The claim is then to be seized as a disputed claim. In the doctrine, it is deduced from this that even if the claimant

files rights to this disputed claim, no opposition proceedings take place: In this case, the acquirer of the disputed claim would first have to clarify with the claimant in a pretender dispute who is the creditor of the disputed claim and then sue the third party debtor for performance. This exception, which is contrary to the system, is justified by considerations of practicability. Since a disputed claim usually has only a low value, it would not be worthwhile to conduct the opposition proceedings. This view must be rejected. It is not evident why, due to the possibly low value of the claim, it should not be decided in the opposition proceedings (but in the pretender dispute) who is the creditor of the disputed claim. For this reason, the same procedure must not be followed just because the third-party debtor does not appear to be solvent, which is also advocated in some cases.

- If, in the case of a wage garnishment, the debtor's creditor status is disputed (due to an assignment of wages): The claim is then to be garnished as disputed.
- The lien of the creditor seeking attachment cannot be disputed by another (non-seizing) creditor, even if the latter or other third parties can themselves register a better right to the pledged object (cf. Art. 155 SchKG). In the case of the lien on movable property, there is no legal remedy corresponding to the action for the settlement of encumbrances. An objection procedure is only carried out in respect of the lien if the creditor presumably secured by the lien registers its right in the debt collection proceedings of the other creditor. However, this presupposes that the asset has been seized before the pledge is realized or - according to the view represented here - at least has been arrested.
- In the case of intermediated securities, the secured party may realize its security interest (i.e. both the full and the pledge) privately even if an attachment exists, if it has reserved the right to do so by contract (Art. 31 para. 2 BESA). In this case, there is no opposition procedure. If the conditions for realization are not met (e.g. because the pledge agreement is invalid or does not entitle the debtor to private realization), the debtor's claim for damages must be attached instead in accordance with Art. 31 para. 4 BESA (probably as a disputed claim).
- Not to be clarified in the opposition proceedings are claims under public law that take precedence over the attachment within the meaning of Art.

44 SchKG, namely the seizure and confiscation under criminal law. This is decided by the criminal authority and not by the civil court.

- Privileges under debt collection law must be asserted in the collocation proceedings (Art. 146 SchKG) or by means of an appeal.

### 3. Registration of the claim

In principle, any person (including the debtor creditor) may register a better right, not only for himself but also for other persons. This already follows from the wording of Art. 106 para. 1 SchKG. 14

It must be clear from the application which right the claimant is asserting in which asset in which debt enforcement proceedings. If a lien is filed, the amount of the claim secured by the lien must also be stated. If the claimant fails to provide this information, the debt collection office must assume that the pledged claim corresponds to the value of the pledge. Ex officio, the debt collection office initiates the objection procedure by way of exception in the case of real estate if the requirements of Art. 10 VZG are met. In the case of securities, the debt collection office shall initiate the objection procedure without notification if, in the case of order papers, the last endorsement is not in the name of the debtor or if there are deeds of assignment or pledge indicating better rights of potential claimants. 15

### 4. Procedure of the Debt Collection Office

The debt collection office has no discretion in deciding whether to initiate the opposition proceedings. The debt collection office may not reject the application even if it seems clear to it that the right does not exist. Exceptionally, however, the debt collection office may disregard the application if the asset was sold by the debtor to the claimant only after the attachment and the debt collection office is convinced that the claimant knew of the attachment. 16

## D. Para. 2: Timely Filing

A claimant may file a claim as long as the proceeds of the liquidated asset have not been distributed (Article 106 para. 2 SchKG). 17

However, the claimant may not wait with the filing in an abusive or grossly negligent manner. In older decisions, the Federal Supreme Court was very strict and held that the claim must be filed within ten days of knowledge of 18 the attachment or arrestment. According to the now established case law, this is no longer necessary. However, abuse of rights is affirmed if there was no reasonable reason to wait and the claimant was aware that it would disrupt the collection or cause the creditor to take unnecessary action. Thus, the filing is manifestly abusive of the right if the filing was made one year after knowledge of the execution of the attachment and without excusable cause. Similarly, the right must already be filed with the final attachment and not only with the prosequence attachment. The prudent claimant will file her claim promptly upon learning of the attachment or upon a final determination that the attachment is permissible.

19 Abuse of rights must be considered by all authorities. The debt collection office may itself conclude that the claimant was late in filing her claim. The debt collection office or the SchKG supervisory authorities may thus decide that the right has been forfeited (at least in enforcement proceedings, see n. 20 below). The claimant's right is then not assessed at all in judicial opposition proceedings. If, on the other hand, the timely filing of the application is only raised in the judicial opposition proceedings, the court must, in my opinion, examine whether the application was filed in time.

### E. Para. 3: Prosecution rights of the better-entitled person

20 According to para. 3, the rights under Art. 934 et seq. CC are reserved. The provision thus clarifies that the so-called substantive prosecution rights take precedence over the provisions on opposition proceedings. The Claimant does not forfeit her rights if she does not initiate the opposition proceedings. However, the claimant can only demand the return of the thing from a bona fide purchaser against compensation (cf. Art. 934 para. 2 CC). The provision is only relevant for objects: In the case of uncertificated claims and shares as well as uncertificated securities there are no rights of pursuit anyway.

## II. ART. 107 / 108 SCHKG

### A. Background to the allocation of party roles

21 Art. 107 /108 SchKG regulate the so-called preliminary proceedings and allocate the party roles between creditor and debtor and claimant. Usually, creditor and debtor have diverging interests. In opposition proceedings, for once they have converging interests (at least if they have no legal or personal con-

nection to the claimant): Both have an interest in the asset being left (unencumbered) in the garnishment. In this case, the asset is realized in favor of the creditor and the debtor's debt is reduced accordingly.

Art. 107 / 108 SchKG contain a mechanism that balances the interests of the creditor and the debtor as well as the claimant and efficiently distributes the party roles. The party whose position seems less likely must sue. 22

## B. Procedure according to Art. 107 SchKG

If the debtor has sole custody of the attached property or his entitlement to the claim is more probable, the creditor or the debtor must dispute the right claimed. If they do not do so, it is deemed to be acknowledged. If, on the other hand, they dispute the right, the claimant must sue. If the claimant does not sue, the right is not taken into account in the attachment (Art. 107 (5) SchKG). 23

The creditor and debtor may demand that the claimant produce the evidence from which she derives her asserted right (Art. 107 para. 4 SchKG). This is a procedural obligation. Default does not lead to a reversal of the parties' roles, but may be taken into account in the allocation of costs (Art. 73 para. 2 SchKG and Art. 107 para.1 ZPO). 24

## C. Procedure pursuant to Art. 108 SchKG

The situation is different if the claimant has custody or at least joint custody of the attached asset or her entitlement to the claim appears more probable. In this case, the debtor or creditor must sue the claimant within 20 days. If they do not sue, the claimant's right is deemed to be recognized and is taken into account in the attachment (Art. 108 (3) SchKG). 25

## D. Criteria for the distribution of party roles

For the distribution of party roles, the decisive factor is thus who has custody or whose entitlement to the claim is more probable. 26

### 1. Custody of property

Custody means the direct factual control over a movable thing. This control is assessed independently of the legal circumstances. It is irrelevant whether the control is legal. Rather, it is a matter of the actual power of disposal over the 27 thing; from a practical point of view, mostly the use. It is true that custody is related to possession under civil law. However, only the immediate owner has custody; it does not matter if the possession is merely "dependent" (e.g. in the case of a tenant). Thus, the concept of custody in the SchKG is largely congruent with that in criminal law.

28 Even if the legal circumstances are not decisive in the assessment of custody, undisputed legal criteria may allow an inference to be drawn as to the actual power of disposal. For example, an employee does not have (joint) custody of property located on the employer's premises. In the banking business, it is not the bank but the bank customer who has custody of assets in safe deposit boxes or (physical) securities accounts.

29 It should also be borne in mind that the distinction between sole and joint custody is always assessed in relation to the claimant: Thus, a married debtor living in the same household as his spouse has sole custody within the meaning of Art. 107 SchKG of an object if his brother claims ownership of it. If, on the other hand, the wife asserts rights, joint custody is to be assumed. In other words, Art. 107 SchKG must be applied even if a fourth party has joint custody.

30 As simple as the principles set out are, it can be difficult in individual cases to distinguish sole custody from joint custody within the meaning of Art. 108 SchKG. The following examples can be cited as illustrations:

- In relation to persons living in the same household: Sole custody exists if the asset was kept in a place that only the debtor can dispose of (e.g. if an asset is kept in a locked desk and only the debtor has a key). Otherwise, there is joint custody.
- There is sole custody if the debtor is listed in the vehicle registration document, only he uses the car and parks it in a separate garage. The fact that his wife has her own key for the garage and occasionally cleans the car is irrelevant.
- According to the Zurich Supreme Court, joint custody exists in the case of a safe deposit box if the claimant has a power of attorney.

## 2. Probable Entitlement to Claim

In order to decide who is more likely to be entitled to a claim, reference is regularly made to documents. In the case of contractual claims, the person who is named as the contractual partner in a written contract is likely to be entitled. Thus, in the case of bank accounts, it is likely that the account holder is also the creditor of the claim. This does not change even if, according to Form A, another person (i.e. the claimant) is the beneficial owner. 31

In the case of a joint account, a distinction must be made between the external relationship (relationship between the bank clients and the bank) and the internal relationship (relationship between the two account holders). The purpose of the joint account is to regulate the external relationship of several persons irrespective of the internal relationship. If the credit balance is seized in the debt collection proceedings against a joint account holder and the joint account holder claims that she is entitled to the credit balance (in full or in part), it will be decided in the opposition proceedings who is actually entitled to the credit balance in the internal relationship. Although the claimant's entitlement as joint account holder is not per se more probable than that of the debtor, in practice the claimant's "joint entitlement" is assumed, which is why she is assigned the role of defendant under Art. 108 SchKG. 32

Otherwise, case law has allocated the defendant role as follows: 33

- If the claimant can produce a deed of assignment, her entitlement is in principle more likely if the garnished claim falls under the transcription of the assigned claim. The situation is different only if the deed of assignment has an obvious defect or, according to the view expressed here, if the assignment has obvious defects in its content (e.g., the claim is unassignable).
- The correctness of an entry in the Commercial Register is presumed. If there is a lack of evidence proving its incorrectness, the material entitlement of the registered shareholder to ordinary shares is more probable than that of a claimant.
- In the case of a trademark, the entry in the trademark register is decisive.

## 3. Real property: Entry in the Land Register

In the case of real property, the entry in the land register is decisive. In practice, opposition proceedings pursuant to Art. 106 et seq. SchKG are seldom 34 used in the case of real property. On the one hand, because in the case of real estate only the ownership can be the subject of the opposition proceedings and the other rights are clarified in the encumbrance settlement proceedings (cf. n. 2 above). On the other hand, because the land register provides greater clarity about the ownership situation.

## 4. Deviation in the case of a pass-through?

35 In the case law it is disputed whether it is possible to deviate from the regulation in Art. 107 / 108 SchKG if assets of the claimant have previously been included in the execution in attachment proceedings by means of an encroachment (cf. on encroachment n. 78 below). According to the Cantonal Court of Graubünden, a reach-through has to be disregarded even if the creditor was able to successfully invoke a reach-through in the attachment proceedings. The Federal Supreme Court, on the other hand, assumes with convincing reasoning that this is possible: the prohibition of abuse of rights applies throughout the legal system and must be observed by all authorities. According to the Federal Supreme Court, it may even be notorious that a debtor de facto uses a company as a vehicle for his assets. In this case, it certainly seems appropriate to proceed according to Art. 107 SchKG and not according to Art. 108 SchKG.

## 5. Custody of a fourth party

36 A fourth party is a person who has nothing to do with the debt collection and also does not claim any right to the disputed asset. If a fourth party has custody of the asset (e.g. tenant, borrower, company commissioned to repair the asset), the custody is attributed to the person for whom he exercises custody. If the fourth party exercises the custody only for the debtor, it is to be proceeded according to Art. 107 SchKG, otherwise according to Art. 108 SchKG. It depends on the opinion of the fourth party for whom he exercises the custody. 6.

## 6. Relevant time

37 In principle, the attachment is the relevant point in time to decide on the custody or the probable entitlement. It should be noted that the evidence that a party cites to support its position on party role allocation may also be from a later date. If the custody relationship cannot be determined at the time of the attachment, the last clearly ascertainable custody relationship is decisive.

If a prior attachment is made, its date is decisive. If seized assets are attached, the decisive factor for the allocation of party roles is who had custody prior to the criminal seizure. In the case of rent retention enforcement, the time of recording the retention list within the meaning of Art. 283 para. 3 SchKG is relevant. This also applies if the items are subsequently (unlawfully) returned to the debtor's premises. 38

## E. Appeal against allocation of party roles

The party adversely affected may appeal against the order setting a time limit within the meaning of Art. 17 SchKG. If the claimant learns that the debt collection office is setting a time limit for the creditor and the debtor to contest their claim in accordance with Art. 107 para. 2 SchKG, it may already file an appeal against this notification if it is of the opinion that the creditor or the debtor is to be assigned the claimant role. 39

By law, the appeal has no suspensive effect (Art. 36 SchKG). If the appeal is granted suspensive effect (after a corresponding application), the time limit for raising the opposition action must be reset even if the appeal is rejected. The appealing party does not have to explicitly request that a new time limit be set for it in case it is unsuccessful. 40

## F. Setting of a time limit

According to Art. 107 para. 5 SchKG or Art. 108 para. 2 SchKG, the debt collection office shall set a time limit for filing an appeal of 20 days. 41

An exception to the running of the time limit applies if one claimant files a claim for ownership of an asset and another claimant files a claim for a lien. In this case, the time limit for the creditor's or debtor's opposition action against the lien does not begin until the opposition proceedings against the claimant of ownership have ended and the asset remains in attachment. The debt collection office must give notice of this special time limit. 42

In principle, the debt collection office has no discretion in setting the deadline pursuant to Art. 108 SchKG. According to the Cantonal Court of Graubünden, even in the case of an attachment of assets, the debt collection office may not wait until a final decision has been made on the attachment (objection to attachment, appeal), but must directly set a deadline for filing an action. This case law is not appropriate: a creditor cannot be expected to pre- 43 pare an opposition action while she does not yet know whether the attachment will be upheld at all. The delay caused by waiting for the final attachment decision must be accepted by the claimant. Finally, the creditor is liable under Art. 273 SchKG for the damage resulting from an unjustified attachment.

## III. ART. 109 SCHKG

### A. Procedural classification of the opposition action

44 The prevailing opinion describes the action for opposition as a "procedural action". This qualification is not convincing: in the opposition proceedings, it is merely determined whether and with what burden an asset can be realized in the foreclosure proceedings in favor of the creditor. Although the court's determination has practical consequences for the compulsory enforcement proceedings - because the outcome of the proceedings affects the enforcement substrate - the legal situation is not changed by the judgment, as is the case with an action for constructive action. In my view, therefore, this is an action for a declaratory judgment. This view is also supported by the fact that the action for a declaration of opposition undisputedly has effect only between the parties to the proceedings and not erga omnes, as is usual in actions for a declaratory judgment. The practical effects of the qualification are, however, manageable (cf. in particular on the legal claim below n. 69 ff.).

45 Within the actions under the SchKG, the action for opposition is qualified as an action under debt collection law with a reflex effect on substantive law. According to the prevailing opinion, this also applies if the debtor and the claimant are opposed to each other. This view is convincing: at the center of the action is the determination of the extent to which the asset is included in the enforcement. The substantive aspects necessary for this are to be examined by the court only on a preliminary basis.

46 Whether the dogmatic division of SchKG actions into actions under debt collection law with or without reflex effect and actions under substantive law is meaningful in itself has been questioned in recent times. In fact, too much weight is given to these categories when they are invoked as decisive arguments for various procedural questions concerning local and subject-matter jurisdiction, arbitrability, or res judicata.

Although the court examines substantive aspects only on a preliminary question basis, the judgment also has "ordinary" res judicata effect. The judgment becomes final within the usual limits, i.e. the identity of the parties and the subject matter of the dispute. Although the court does not legally determine who has which right to the asset, it does make a binding decision as to whether the right asserted by the claimant will be taken into account in the execution. Should the asset in question (for whatever reason) be seized again in new enforcement proceedings, the question of the better right between the same parties would already have been legally settled. Therefore, the subject matter of the dispute is identical, even if the legal claim will be slightly different (debt collection no.; garnishment deed). This view, however, does not correspond to the prevailing opinion and case law. According to this, the opposition proceedings always only have effect for the debt collection in question and not for a further debt collection. Thus, the proceedings with binding effect could only end to the disadvantage of the claimant. If the claimant loses, the asset will be liquidated. If, on the other hand, the Claimant prevails, the creditor could initiate new debt enforcement proceedings and make a new attempt to have the asset realized in her favor with improved argumentation. This consequence does not seem appropriate. Even if the action is a reflex action under debt collection law, the court decision must have binding effect. 47

## B. Prerequisites for Proceedings

### 1. Local jurisdiction

#### a. Domestic case

In domestic cases, the rule of jurisdiction is simple: if the claimant is assigned the role of defendant, the creditor or debtor must file the action at the claimant's domicile (Art. 109 para. 2 SchKG). In other cases, the court at the place of debt collection has jurisdiction (Art. 109 para. 1 SchKG). If the dispute revolves around real property, the action must be filed at the place where the real property is located (Art. 109 para. 3 SchKG). 48

#### b. International facts

In principle, Art. 109 SchKG is also applicable in the case of an international factual situation. In the scope of application of the Lugano Convention, the opposition proceedings fall, according to the Federal Supreme Court, under 49

Art. 22 No. 5 Lugano Convention, irrespective of whether the creditor or the debtor faces the claimant. Dogmatic arguments can be put forward for this, namely the uniformity of the debt enforcement proceedings or the close connection to the enforcement proceedings. Ultimately, however, these arguments have a practical background: the proceedings would be complicated for all parties involved and, in particular, would be almost unreasonable for a creditor if, in the worst case scenario, she had to initiate opposition proceedings in a third jurisdiction after the recognition proceedings abroad and the enforcement proceedings in Switzerland.

50 However, this case law of the Federal Supreme Court is controversial. There are divergent opinions in the doctrine, which provide for different jurisdictions in different constellations:

- According to one doctrine, the opposition action is judged according to Art. 2 LugÜ if the debtor and the claimant are opposed to each other. This is justified by the fact that it is then a substantive action. According to the view expressed here, this assumption is incorrect, which is why the conclusion must also be rejected (cf. n. 45 above).
- According to another view, Art. 2 Lugano applies if the creditor or the debtor brings an action against the claimant within the meaning of Art. 108 SchKG. Since the Claimant has custody of the asset or its entitlement seems more probable, it cannot be expected to be involved in proceedings abroad (i.e. in Switzerland) where the claimed right is in fact at stake. It is rightly objected to this argument that, after all, the disputed assets are located in Switzerland. A foreign claimant must expect to be involved in a legal dispute at the place where the asset is located (e.g., in the case of a bank account or real property).

51 In summary: According to convincing Federal Supreme Court jurisprudence, even in an international situation, there is always jurisdiction in Switzerland pursuant to Art. 109 paras. 1-3 SchKG.

## 2. Jurisdiction on the merits

52 In principle, the cantonal law determines the substantive jurisdiction (Art. 4 ZPO). If a canton provides for a commercial court, this is not competent for opposition actions. In the Canton of Zurich, the individual court of the district court has subject-matter jurisdiction (§ 24 lit. b of the Law of the Canton of

Zurich of 10.5.2010 on the Organization of Courts and Authorities in Civil and Criminal Proceedings (GOG/ZH; LS 211.1).

## 3. Observance of time limits

There is no conciliation procedure (Art. 198 lit. e No. 3 ZPO). The 20-day time limit for filing an action can therefore only be observed by filing the action with the court. Compliance with the time limit is a prerequisite for the proceedings. In principle, the time limit cannot be extended or rescheduled (by the debt collection office). 53

If the creditor misses the deadline, she can file the action again in a new debt collection, provided the assets are still available. This consequence corresponds to the order in Art. 108 para. 3 SchKG, according to which the claim (only) falls out of consideration in the relevant debt collection or is deemed to be recognized if no action is filed. 54

The time limit of 20 days for filing an action is very short. The short period is one of the reasons why in practice complaints are often lodged against the allocation of the parties' roles. If the court grants suspensive effect, the plaintiff has the necessary time even if the court ultimately rejects the complaint (see n. 40 above). If the allocation of the parties' roles cannot be challenged on the basis of the clear factual and legal situation, the doctrine mentions the possibility of filing an unfounded complaint in the simplified procedure or merely briefly substantiating the complaint in the ordinary procedure. The latter is, of course, only an emergency measure. In more complex cases, at least the creditor should start drafting the lawsuit before the debt collection if she wants to fight a presumed, already known address. 55

Whether the debt collection vacations of the SchKG or the court vacations of the ZPO are applicable for the filing of the action has not been conclusively clarified under current law. There are different opinions in the doctrine. As with other SchKG actions, there is thus considerable uncertainty. However, from the latest case law of the Federal Supreme Court, it can at least be deduced that one of the two regulations applies and that no time limit at all applies. 56

The legislator has created clarity with the revision of the CCP. Article 145 para. 4 nZPO provides that "[t]he provisions of this Act on the standstill of time limits shall apply to all actions under the SchKG that are to be filed be- 57 fore a court." Thus, as of the effective date of the revision, the court vacations under ZPO will be applicable. Until then, however, the prudent plaintiff will not rely on the fact that the courts already apply this provision.

58 Once the action is pending, the court vacations according to ZPO already apply under current law for the ongoing process as well as for the time limit for appeal.

59 Until now, the (exceptional) extension or restoration of the time limit has been governed by Art. 33 para. 2 and para. 4 SchKG. Since Art. 145 para. 4 nZPO only regulates the standstill of the time limit, these provisions should continue to apply.

### 4. Pending debt enforcement or attachment proceedings

60 If the debt collection lapses, there is no interest in legal protection, which is why the action for opposition becomes irrelevant. Likewise, the action for opposition becomes irrelevant if the debtor is declared bankrupt.

61 The court dealing with the opposition proceedings may also itself determine that the debt collection or attachment is null and void, which is why the proceedings would have to be written off. According to the Federal Supreme Court, this applies in any case if the nullity is "beyond doubt".

62 According to case law, the creditor can "abort" the opposition proceedings by withdrawing the debt collection even if she realizes that she has committed (procedural) errors and force a new opposition proceeding with a second attachment or seizure. Since the valid debt collection is a procedural requirement, this consequence is correct and the court has to write off the proceedings as without object. In this case, the creditor bears the costs of the proceedings (cf. Art. 107 lit. e ZPO).

### 5. Valid Application

63 The claimant may not wait with the application in an abusive manner (see n. 18 above). As mentioned in n. 19 above, the court may also examine whether the application was filed in time or late.

64 In principle, the court examines only those rights that have been filed by the claimant with the debt collection office. However, it is possible that the claimant asserts a less extensive right in the lawsuit (e.g., a lien if she claimed

ownership in the application). The amendment of the claim is governed by Articles 227 and 230 of the Code of Civil Procedure.

## C. Individual issues

### 1. Effects of the action on the attachment proceedings

Pursuant to Art. 109 para. 4 SchKG, the court shall notify the debt collection office of the receipt and discharge of the action. The reason for this rule lies in the effect according to para. 5, according to which the debt collection for the asset in question remains suspended and the time limits for the request for realization stand still. 65

### 2. Agreement on the place of jurisdiction

According to the general opinion, the jurisdiction pursuant to Art. 109 SchKG is mandatory. This is convincing: Art. 17 CCP does not apply because the SchKG regulates which court is competent to judge this action under debt enforcement law with reflex effect on the substantive law (cf. Art. 46 CCP). This also applies in international relationships. 66

### 3. Arbitrability of the action for opposition

It is disputed whether the action for opposition is arbitrable. At first glance, it does not seem outlandish that an arbitral tribunal can also rule on an action of opposition. In contrast to the place of jurisdiction, there is no provision in the SchKG that provides for an order for arbitration courts that deviates from the ZPO or the IPRG. Moreover, it is a question of pecuniary claims (within the meaning of Art. 177 IPRG), which the parties can freely dispose of (within the meaning of Art. 354 ZPO). Due to the latter circumstance, the protection of uninvolved attachment creditors does not speak against arbitrability. Creditors who have not themselves decided to contest an address under Art. 107 SchKG or to bring an action under Art. 108 SchKG are not in need of protection. 67

Nevertheless, there are legitimate arguments against the arbitrability of the opposition action. On the one hand, there is a close connection to enforcement proceedings and thus to public law. On the other hand, the conduct of arbitration proceedings would lead to practical problems. In the case of an arbitration agreement between debtor and claimant, it would be uncertain in in- 68 dividual cases whether the action for opposition should be covered by the agreement. Moreover, if several creditors and, at most, the debtor want to participate in the opposition proceedings, the situation could arise that the same dispute would be settled once before the state court and once before the arbitral tribunal. As a result, the opposition action is convincingly not arbitrable.

### 4. Legal claims

69 According to certain doctrinal opinions, the claimant may not request a declaration that the right in question (does not) exist. Instead, it must formulate an instruction to the debt collection office. Thus, the claimant should request that the asset be released from seizure or that the right she has filed for be acquiesced in. Such a request fits in with the qualification as a procedural claim made by the majority (see above n. 44). According to the view represented here, according to which the opposition action is an action for a declaratory judgment, the formulation as a request for a declaratory judgment would be dogmatically correct (cf. n. 44 above). In practice, however, both formulations must be possible anyway, because it is clear both in the case of an instruction to act and in the case of a request for a declaratory judgment what the plaintiff wants.

70 Since the prevailing opinion is in favor of an instruction to act, the following example is formulated in this sense. The legal claims can - following Vock/Meister-Müller - read as follows.

71 Legal request of the debtor/creditor:

*"The asset value [designation] in the attachment ([no.]) dated [...] should be left in the debt collection no. [...] of the debt collection office [...] against [debtor]."*

*"That in Collection No. [...] of the Collection Office [...] against [Debtor], the asset [designation] be left as unencumbered in the attachment ([No.]) of [...]."*

72 Claimant's legal request:

*"In Collection No. [...] of the Collection Office [...] against [Debtor], the asset [designation] should be released from the attachment ([No.]) of [...]."*

*"It is to be noted in the debt collection No. [...] of the debt collection office [...] against [debtor] the asset [designation] in the attachment ([No.]) of [...] as having a [designation limited right in rem, e.g. lien] of the plaintiff in [[...] rank] and the right is to be taken into account in the realization in accordance with the statutory provisions."*

## 5. Value in dispute

The amount in dispute is always the lowest of the following amounts: The claim pursued, the asset value (usually the appraisal value in the attachment deed) or - if a lien has been filed - the value of the claim secured by lien. The plaintiff must quantify the amount in dispute in the complaint (cf. Art. 221 para. 1 lit. c CCP). 73

## 6. Burden of proof

The distribution of the roles of the parties does not change the burden of proof. This is governed by Art. 8 of the Civil Code. According to this, the claimant must prove those facts that justify her claimed better right. For example, in the case of seizure of a joint account, the burden of proof lies with the joint account holder; she must prove that she is entitled to the credit balance in the internal relationship. In the case of ownership, the court will usually resort to the presumption of title under Article 930 of the Civil Code, at least if ownership is "unequivocal." 74

Particularly in the case of a lien, proof will not be excessively difficult for the third party. In most cases, a written pledge agreement is sufficient for this purpose. These documents may already be presented in the preliminary proceedings (cf. Art. 107 para. 3 SchKG / 108 para. 4 SchKG). 75

The debtor or creditor, on the other hand, bears the burden of proof for those facts from which they derive an own right of the debtor or a plea which opposes the claimant's right. Examples include the commingling of cash received by the claimant or the debtor's acquisition of a right in rem to retain the asset. 76

The contesting creditor regularly finds herself in a difficult situation. She has to conduct a lawsuit on the legal relationship between the debtor and the claimant, the circumstances of which she usually does not know or knows only superficially. In practice, litigation usually arises when the creditor sus- 77 pects fraudulent conduct, especially when the debtor and the claimant are personally or legally related. In practice, the evidence needed to conduct the lawsuit usually comes from other civil or criminal proceedings.

78 Arguments frequently invoked by the creditor in practice are:

- The invocation of (formal) ownership is abusive of rights, which is why an economic approach must take the place of a legal one. If legal entities are involved, the asset is included in the attachment in such cases with the help of a pass-through. If assets of a private person are to stand in for a debt of a legal entity, this is referred to as direct enforcement. If a company's assets are to be used as the enforcement substrate for a debt of a natural person, this is known as reverse seizure. In both cases, it is a prerequisite that (1) the company is controlled by the natural person and (2) the invocation of legal independence appears to be an abuse of rights. This is the case, for example, if the assets of the company and the individual are mixed. Whether the requirements for a pass-through are met depends to a large extent on the individual case. A pass-through is usually successful if the debtor's conduct appears fraudulent. In the case of private individuals, the assets held by a third party can be seized in particular if the third party merely acts as a straw man and holds the asset on behalf of the debtor.
- The legal transaction (e.g. the pledge) between the debtor and the claimant is invalid because, for example, it is simulated, immoral or unlawful. The latter is the case, for example, if the pledge (in the context of a banking transaction) served to evade taxes or to launder money and this was apparent to the other party.
- In the absence of a pledged claim, there is also no lien.
- The acquisition of the better right by the claimant is paulian contestable.
- The legal transaction in question was carried out only after the attachment and is therefore invalid vis-à-vis the creditor (cf. Art. 96 para. 2 SchKG).

## 7. Joint litigation

79 In opposition proceedings, the claimant on the one side and the debtor/creditor on the other side are opposed. It is therefore questionable whether debtor and creditor(s) can or must sue jointly (or whether they can or must be sued jointly).

According to the general opinion, a case of simple joint litigation exists in the case of opposition actions: I.e., several persons can sue and be sued together, because, as a rule, there is a factual connection within the meaning of Art. 71 CCP. In contrast, Jeandin assumes that there is a (non-proper) necessary joinder of parties. This view seems convincing: If the same better right is at stake, it cannot be protected in one proceeding and denied in a parallel proceeding. The situation is thus similar to Art. 260 SchKG. The creditor(s) and debtor(s) do not have to conduct the proceedings uniformly, but the better right must be decided uniformly. If separate lawsuits are filed, they must be united according to Art. 125 lit. c CCP. 80

## 8. Notice of dispute

Proclamation of a dispute pursuant to Art. 78 CCP is possible, but hardly relevant in practice. The same applies to the subsidiary intervention and the notice of dispute. 81

## 9. Effect of the Judgment

If the claimant wins, the now established better right is taken into account in the enforcement proceedings. If, on the other hand, the creditor or debtor prevails, the asset value without the asserted right remains in the compulsory enforcement proceedings. If the debtor was a party to the opposition proceedings, all petitioning creditors benefit. This also applies if creditors participated in the proceedings at the same time. If one or more creditors participated in the proceedings (but not the debtor), the proceeds of the liquidated asset or the surplus proceeds obtained due to the lapsed right shall serve to satisfy their claims. In this case, any surplus remains with the losing claimant, i.e. only those creditors who conducted the opposition proceedings benefit. 82

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COMMENTARY ON

# Art. 151 DEBA

A commentary by Ramin Paydar

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**Fourth title: Enforcement of liens**

**A. Application for enforcement**

**Art. 151**

[1] Anyone who initiates debt enforcement proceedings for a claim secured by a pledge (Art. 37) must, in addition to the information listed in Article 67, specify the object of the pledge in the application for debt enforcement. Furthermore, the request must state, where applicable

a. the name of the third party who created the pledge or acquired ownership of the pledged object;

b. the use of the pledged property as a family home (Art. 169 CC) or as a shared home (Art. 14 of the Partnership Act of June 18, 2004) of the debtor or the third party.

[2] If a creditor initiates debt enforcement proceedings on the basis of a pledge on which a third party has a subsequent lien (Art. 886 CC), the creditor must notify the third party of the initiation of debt enforcement proceedings.

# CONTENT

# I. OVERVIEW

1 The SchKG recognizes two types of special execution: debt enforcement for attachment (Art. 89 et seq. SchKG; main form) and debt enforcement for realization of a pledge (special form). The latter is dealt with in Art. 151-158 SchKG. These provisions apply if the monetary claim to be enforced is secured by a pledge within the meaning of Art. 37 SchKG (see para. 5 et seq.) (see Art. 151 para. 1 SchKG).

2 The initiation and continuation proceedings in debt enforcement proceedings for the realization of a pledge largely coincide with the ordinary initiation proceedings and the continuation proceedings in debt enforcement proceedings for attachment. Art. 151 et seq. SchKG, however, contain a number of special features that must be observed in debt enforcement proceedings for the realization of liens (see Art. 87 SchKG). These are briefly explained below as a general preliminary remark to Art. 151 et seq. SchKG - are briefly explained (N. 3 et seq.). This is followed by an explanation of the special features in connection with the application for debt enforcement (Art. 151 para. 1 SchKG; Nos. 20 et seq.) and the duty of notification in the event of subsequent pledging (Art. 151 para. 2 SchKG; Nos. 43 et seq.).

# II. DEBT ENFORCEMENT FOR REALIZATION OF PLEDGE

## A. Scope of application

### 1. Preliminary remarks

3 Pledge enforcement is a special form of special execution and has a limited (material) scope of application: a claim secured by a pledge is required in order to carry out enforcement for pledge realization (hereinafter N. 5 et seq.). However, this does not mean that if there is a claim secured by a pledge, debt enforcement for realization of the pledge must always be carried out. However, due to Art. 41 SchKG (beneficium excussionis realis), this type of debt enforcement is the main focus in the case of claims secured by lien (see N. 8 et seq. below).

Local scope of application: A place of enforcement in Switzerland is required for the enforcement of a pledge (territoriality principle). Art. 51 SchKG is relevant for determining the place of debt enforcement: 4

- In the case of claims secured by a lien on real property, debt enforcement takes place at the place where the property is located (Art. 51 para. 2 SchKG); debt enforcement for realization of a lien on real property is thus only possible if the property is located in Switzerland (cf. Art. 1 para. 1 VZG).
- In the case of claims secured by a pledge, the creditor can choose between the place where the property is located and the general places of debt enforcement pursuant to Art. 46 et seq. of the SchKG (Art. 51 para. 1 SchKG). As long as a general place of debt enforcement pursuant to Art. 46 et seq. SchKG exists in Switzerland, it is not decisive for the raising of the debt enforcement proceedings whether the pledged asset is located in Switzerland or not; the pledged asset must first be brought to Switzerland for realization.

## 2. In detail

### a. Claim secured by pledge

In order for debt enforcement proceedings for the realization of a pledge to be conducted, "a claim secured by a pledge (Art. 37 [SchKG])" is required (Art. 151 para. 1 and Art. 41 para. 1 SchKG). A claim is therefore required on the one hand (N. 7) and on the other hand its security by a pledge (N. 6). The following must be stated in this regard: 5

(i) The procedure for the realization of a pledge presupposes first of all that a lien exists. Liens are limited rights in rem in the form of security and realization rights. Liens have their legal basis in the CC; nevertheless, the SchKG recognizes an independent concept of lien that is broader than that in civil law. The term "pledge" within the meaning of the SchKG includes both mortgages and liens (Art. 37 para. 3 SchKG). The terms "security right over real property" and "pledge" are defined in Art. 37 para. 1 and 2 SchKG. Mortgages include in particular the mortgage bond (Art. 824 et seq. CC) and the mortgage note (Art. 842 et seq. CC); liens include - in addition to the pledge (Art. 884 CC) - in particular the lien on claims and other rights (Art. 899 et seq. CC) as well as the various rights of retention. There are also other "liens" that are 6 covered by Art. 37 SchKG; these are excluded below and reference is made to the relevant specialist literature. Four further points should be made:

- According to case law and the vast majority of doctrine, transfer of ownership by way of security and assignment by way of security are not liens within the meaning of Art. 37 SchKG.
- Even if book-entry securities are not expressly mentioned in Art. 37 SchKG, liens on book-entry securities can also be enforced by means of debt enforcement for the realization of the lien; however, the normal legal case provides for the private realization of book-entry securities (Art. 31 BEG).
- Art. 92 SchKG contains a list of assets that cannot be seized. However, this provision only applies to debt enforcement proceedings for seizure. Assets that cannot be seized may therefore be ordered as a pledge in debt enforcement proceedings for the realization of a pledge and realized accordingly.
- The scope of the lien (to be distinguished from the scope of the security; see N. 7) determines the question of which objects/claims form the basis of the lien and can therefore be realized in the event of the debtor's default. In the case of mortgages, the scope of the lien is determined in accordance with Art. 805 et seq. CC: In addition to the property, the mortgage also includes all components and appurtenances (Art. 805 para. 1 CC). Any disputes regarding the status of components and appurtenances must be settled in the encumbrance settlement proceedings (Art. 140 SchKG) (Art. 11 para. 4 VZG; see also Art. 38 para. 2 VZG in conjunction with Art. 102 VZG). In the case of rented/leased properties, the lien extends to the rent/leasehold interest claim "that has accrued since the commencement of proceedings for the realization of the mortgage or since the opening of bankruptcy proceedings against the debtor until realization" (Art. 806 para. 1 CC); provided, however, that the lienor explicitly requests the extension of the lien in the debt enforcement proceedings (Art. 152 para. 2 SchKG; on the rent/leasehold block OK-Paydar, Art. 152 SchKG N. 23 et seq.). The scope of the lien is regulated in Art. 892 CC: In addition to the pledged property, both the appurtenances and the fruits that are part of the pledged property at the time of the realization of the pledge are subject to the lien (Art. 892 para. 1 and 3 CC). In the case of liens on claims with recurring ancillary benefits (e.g. interest), only the current claim is deemed to

be pledged, but not the benefits that have already lapsed (Art. 904 para. 1 CC; see, however, the exception in Art. 904 para. 2 CC).

(ii) The secured claim may be a claim under private or public law. The scope of the security - i.e. for which claims and any additional costs the lien grants security - varies depending on the lien. The following is a (non-exhaustive) overview of the scope of security provided by various liens that are relevant in practice: 7

- Lien of pledge: This provides the creditor with "security for the claim, including contractual interest, collection costs and default interest" (Art. 891 para. 2 CC). With regard to contractual interest, there is no time limit (unlike with security rights over real property; Art. 818 para. 1 no. 3 CC.); accordingly, the pledge is liable for all contractual interest that is still outstanding at the time of realization. Art. 891 para. 2 CC is of a dispositive nature; the parties can therefore extend or limit the scope of the security.
- In the case of liens on claims (see Art. 899 para. 2 CC) and retention rights pursuant to Art. 895 et seq. CC, the scope of the security is also assessed in accordance with Art. 891 para. 2 CC (see above).
- Landlord's right of retention: In the case of commercial leases, the landlord has a special right of retention to secure its claims (Art. 268 et seq. CO; Art. 283 et seq. SchKG). This right of retention secures not only the rent claims (net rent and ancillary costs), but also the debt collection and retention costs (including legal costs). However, security payments provided for in the rental agreement or pure claims for damages by the landlord are not covered by the right of retention.
- Mortgages with a fixed amount (capital mortgages; Art. 794 para. 1 CC) grant the creditor security for the capital claim, the costs of enforcement, default interest as well as three years' interest that has expired at the time of the application for enforcement of the lien and the current interest since the last interest payment date (Art. 818 para. 1 CC; cf. in cases of legal standstill additionally Art. 57b para. 1 SchKG). In addition to the capital sum entered in the land register, the capital mortgage also offers the creditor security for certain ancillary claims. If the exact amount of the claim is not determined - i.e. in the case of a maximum mortgage - Art. 818 CC does not apply. In this case, the parties must specify a maximum amount in the land register "up to which the property is liable for all claims of the

creditor" (Art. 794 para. 2 CC). As a result, interest and other costs are only secured by lien within the maximum amount entered in the land register; the extension of the lien to ancillary claims (as defined in Art. 818 CC) is excluded.

- In principle, Art. 818 CC also applies to mortgage notes (Art. 842 et seq. CC) (see above). Particular attention must be paid to the last sub-clause of Art. 818 para. 1 no. 3 CC: According to this, only the interest actually owed on the mortgage note is secured by a lien. This sub-clause was introduced by the legislator as part of the revision of the law on mortgage notes; however, it is (or was) unclear whether these provisions refer to the interest from the mortgage note claim or from the claim from the underlying relationship. According to the Federal Supreme Court, Art. 818 para. 1 no. 3 CC refers to the interest from the debt certificate claim, whereby the creditor can only claim this interest for the interest still outstanding from the basic claim.
- In the case of statutory mortgages, the scope of the security is assessed in accordance with Art. 818 CC (see above), unless a special rule applies. This standard applies in particular to the practically relevant builder's lien (Art. 837 para. 1 no. 3 CC). However, the following should be added: In order to enforce a lien, the builder's lien must be definitively entered in the land register. In the case of a provisional entry (priority notice; Art. 76 para. 3 GBV and Art. 961 para. 1 no. 1 CC), the only recourse is ordinary enforcement for attachment or bankruptcy.

### b. Priority of enforcement for realization of the pledge

8 Claims secured by a pledge are generally subject to enforcement for realization of the pledge. This applies regardless of whether the debtor is subject to bankruptcy proceedings or not (Art. 41 para. 1 SchKG).

9 Although the debt enforcement office determines the type of debt enforcement proceedings (Art. 38 para. 3 SchKG), debt enforcement proceedings for the realization of pledges are generally only initiated at the request of the creditor (but see n. 23). The debt enforcement office is bound by this request; if it nevertheless carries out debt enforcement proceedings for seizure or bankruptcy, the debtor can defend itself by means of an appeal (Art. 17 SchKG) and demand the debt enforcement proceedings for realization of the pledge.

If the creditor initiates debt enforcement proceedings for seizure or bankruptcy despite the claim secured by a lien, the debtor can raise the substantive defense of beneficium excussionis realis (defense of advance realization) and thus enforce the debt enforcement proceedings for realization of the lien (Art. 41 para. 1bis SchKG). The debtor asserts the objection by means of a SchKG appeal; the appeal period is ten days from service of the payment order (Art. 17 SchKG). If the debtor fails to meet this deadline, he can no longer contest the debt enforcement proceedings for attachment or bankruptcy at a later date. 10

The (de facto) priority of the enforcement of liens for claims secured by liens 11
contained in Art. 41 para. 1bis SchKG is subject to various exceptions, i.e. the debtor cannot raise the plea of beneficium excussionis realis in the following cases:

- In the case of interest and annuities secured by a lien on real property, the creditor has the option of choosing between enforcement for realization of the lien and enforcement for attachment or bankruptcy (Art. 41 para. 2 SchKG).
- The creditor also has the choice between enforcement of the pledge and enforcement of the bill (Art. 41 para. 2 and Art. 177 para. 1 SchKG).
- If the creditor waives the lien in statutory form and the debtor is notified of this with the payment order at the latest, the debtor cannot raise the plea of beneficium excussionis realis. In the case of a mortgage, the waiver only becomes effective upon deletion from the land register (Art. 801 CC). In the case of a security right over real property, the unilateral waiver of the security right over real property by the creditor is sufficient; a return pursuant to Art. 889 para. 1 CC is not required to exclude the defense.
- It is also possible for the creditor and the debtor to contractually exclude the plea of beneficium excussionis realis; this can be done before or after the debt enforcement proceedings have been raised. The parties are not bound by any form (Art. 11 para. 1 CO); however, the written form is recommended, as an oral or implied waiver of the defense is difficult to prove.
- Finally, the parties can agree on private realization (by selling or entering the property themselves) (see Art. 890 para. 2 CC), which also excludes the objection of prior realization. However, if the debtor goes bankrupt or the pledged property has been seized or arrested, the pledgee cannot (or can

no longer) exercise her right to private realization. Furthermore, agreements under which the creditor is to acquire ownership of the pledged property - without debt enforcement - are null and void (so-called forfeiture agreements; Art. 816 para. 2 and Art. 894 CC); this raises difficult questions of demarcation from the (generally permissible) agreement of self-enforcement.

12 In principle, the opening of bankruptcy proceedings leads to the cancellation of debt enforcement proceedings pending against the debtor (Art. 206 para. 1 SchKG). However, this only applies to debt enforcement proceedings against a debtor who is also the owner of the pledge; if a third party has created the pledge (third-party pledge relationship), the debtor's debt enforcement proceedings to realize the pledge can be continued even if bankruptcy proceedings have been opened against the debtor (Art. 89 para. 1 VZG).

## B. Procedure

13 The initiation and continuation proceedings in debt enforcement proceedings for the realization of liens are largely the same as the ordinary initiation proceedings and the continuation proceedings in debt enforcement proceedings for attachment. Nevertheless, the SchKG contains in Art. 151 et seq. SchKG and elsewhere, the SchKG contains various (special) provisions relating to the enforcement of liens. The procedure and its special features are summarized below:

14 (i) The creditor initiates the debt enforcement proceedings by submitting a debt enforcement request to the competent debt enforcement office (Art. 51 SchKG; see N. 4). The content of this request is primarily determined in accordance with Art. 67 SchKG. Further information is also required for the debt enforcement for realization of the pledge (Art. 67 para. 2 SchKG): For example, the debtor must provide information about any third-party lien holders and indicate the use of the attached property as a family home/shared residence (Art. 151 para. 1 SchKG; see N. 26 et seq.). Furthermore, the debtor can also request the extension of the lien to include rent/leasehold claims (Art. 152 para. 2 SchKG; see OK-Paydar, Art. 152 SchKG N. 23 et seq.). In addition to the debt enforcement request, the debt enforcement lienor is obliged to notify any subsequent lienors of the initiation of the debt enforcement proceedings (Art. 151 para. 2 SchKG; see n. 43 et seq.).

(ii) Upon receipt of the application for debt enforcement, the debt enforcement office issues an order for payment. This contains the information listed in Art. 69 para. 2 SchKG. In addition, the special features pursuant to Art. 152 para. 1 no. 1 and 2 SchKG (pledged object, special payment deadline and threat) must be observed in the case of debt enforcement for realization of a pledge (see OK-Paydar, Art. 152 SchKG no. 2 et seq.; specimen forms no. 3a and 3b). In addition to the creditor and the debtor, any co-operators are also served with the payment order in the debt enforcement proceedings for realization of the pledge (Art. 70 and Art. 153 para. 2 SchKG). Furthermore, the other general provisions on the order for payment apply in debt enforcement proceedings for the realization of pledges (Art. 153 para. 4 in conjunction with Art. 71-73 SchKG). 15

(iii) In accordance with the express reference, the general provisions on the legal proposal and on the opening of legal proceedings apply in the debt enforcement proceedings for the realization of liens (Art. 153 para. 4 in conjunction with Art. 74-86 SchKG). In debt enforcement proceedings for the realization of liens, it is particularly important that - in addition to the debtor being pursued - all co-operating companies can also file an objection in accordance with Art. 153 para. 2 and 2bis SchKG. Otherwise, the procedure is basically the same as in ordinary initiation proceedings: The (co-)debtor can lodge an objection (Art. 74 et seq. SchKG) and the debtor then has the option of removing the objection by means of (provisional or definitive) legal opening or an action for recognition (Art. 79 et seq. SchKG; for the special features in connection with the rent/leasehold freeze, see. OK-Paydar, Art. 152 SchKG N. 35 f.). The following can be disputed with the legal proposal: The existence, scope and due date of the claim as well as the existence and scope of the lien. If the debtor raises an objection to the claim and the lien, the debtor can only have the objection removed if it has a title to the lien and the amount of the lien. 16

(iv) It is inherent to the system of debt enforcement for the realization of liens that the attachment stage no longer applies; a request for continuation is therefore not required. As soon as the debtor has obtained a legally binding payment order in pending debt enforcement proceedings and complies with the minimum and maximum time limits pursuant to Art. 154 SchKG, it can submit the request for realization. If the debt collector (erroneously) submits a request for continuation (Art. 88 SchKG) instead of a request for enforcement, 17 the debt enforcement office must give the debt collector the opportunity to rectify the situation (Art. 32 para. 4 SchKG).

18 (v) As soon as the debtor has submitted the request for realization in the debt enforcement proceedings for the realization of the pledge, the proceedings enter the realization stage. The realization of the pledge is governed by reference to the realization procedure in the debt enforcement proceedings for attachment (Art. 155 f. SchKG; see also Art. 102 VZG). In particular, any objection proceedings are conducted at this stage of the proceedings (Art. 106 et seq. SchKG). In the case of real estate, the debt enforcement office also draws up a list of encumbrances and conducts the encumbrance adjustment proceedings (Art. 140 SchKG).

19 (vi) The realization of the pledged object is followed by the distribution of the pledge proceeds. Here, Art. 157 SchKG must be observed as well as - due to the reference in Art. 157 para. 4 SchKG - Art. 147, 148 and 150 SchKG. The costs for the administration of the pledge as well as the realization and distribution must be paid in advance from the pledge proceeds (Art. 157 para. 1 SchKG); in particular, the real estate gains taxes are part of the realization costs. The remaining pledge proceeds are used to satisfy the pledgees; any surplus goes to the pledge owner. If the proceeds of the pledge are not sufficient to satisfy all pledgees, a schedule of claims procedure must be carried out (Art. 157 para. 3 SchKG); notification and contestation are governed by Art. 147 and 148 SchKG. If the pledge could not be realized at all due to the principle of coverage (Art. 126 SchKG) or due to a waiver by the pledgee (Art. 127 SchKG), or if the proceeds of the pledge do not fully cover the pledgee's claim, the debt enforcement office issues a certificate of default (Art. 158 para. 1 SchKG) to the claiming pledgee (and only to the latter). Within one month of receipt of the certificate of lien, the creditor can submit a request for the continuation of debt enforcement proceedings for attachment or bankruptcy without a new payment order having to be issued (Art. 158 para. 2 SchKG). Furthermore, the certificate of lien is deemed to be an acknowledgement of debt within the meaning of Art. 82 SchKG and therefore constitutes a provisional title for the opening of legal proceedings. The certificate of lien is not a certificate of loss (see Art. 149 SchKG).

# III. APPLICATION FOR DEBT ENFORCEMENT (PARA. 1)

## A. Preliminary remarks

The pledgee initiates the debt enforcement proceedings by submitting a written or oral request for debt enforcement to the competent debt enforcement office, stating certain details (see N. 21 et seq.). The request is directed against the debtor (not necessarily the same as the lien holder). This requires explanation in three respects: 20

- Form: The pledgee can submit the debt enforcement request orally or in writing (Art. 67 SchKG). In the case of a written request, it is advisable to use the federal model form no. 1, although its use is not mandatory (Art. 3 para. 1bis VFRR). The pledgee can also process the debt enforcement request via the "Easygov" platform provided by the federal government; the completed debt enforcement request can then be submitted to the debt enforcement office electronically (Art. 33a para. 1 SchKG) or by post (in paper form). Regardless of the form of the debt enforcement request and the method of submission, a signature of the debt enforcement pledgee is required. This even applies to oral debt enforcement requests: The debt enforcement office must transfer the oral information to model form no. 1 and have the form signed by the debtor (Art. 3 para. 2 VFRR). If the signature is missing (or if there is another improvable formal error), this is not detrimental; the debt enforcement office must give the debtor the opportunity to improve the form (Art. 32 para. 4 SchKG).
- Active legitimation: If only one lienor is entitled to the lien, this lienor alone has the active legitimation to enforce the realization of the lien. If several lienors are entitled to the lien jointly, they can only proceed jointly. In the case of different liens with different rankings, each individual lienor has the right to act independently of the others.
- Passive legitimation: The debt enforcement request is directed against the debtor of the claim, who is normally also the owner of the pledge. In the case of a third-party pledge, the debtor and pledge owner are not the same person. Nevertheless, the pledgee only has to submit a debt enforcement request; the third-party pledgee is included in the proceedings as a co-operating party (see Art. 153 para. 2 and 2bis SchKG).

21 The debtor must include all the information required by Art. 67 and Art. 151 SchKG in the debt enforcement request, otherwise it risks the debt enforcement or the order for payment being set aside or declared null and void on appeal; if necessary, the debtor must first be given a period of time to rectify the deficiencies (see Art. 32 para. 4 SchKG; see Nos. 23 and 31 f.). First of all, every debt enforcement request must contain the following information: Name and place of residence of the enforcing pledgee (Art. 67 para. 1 no. 1 SchKG), name and place of residence of the enforced debtor (Art. 67 para. 1 no. 2 SchKG), the amount of the claim (in Swiss francs; Art. 67 para. 1 no. 3 SchKG) and - if available - the claim document and its date (Art. 67 para. 1 no. 3 SchKG). In addition, the debtor must request the realization of the pledge in the debt enforcement proceedings pursuant to Art. 151 para. 1 SchKG (N. 23) and provide information on the pledged property (N. 24 et seq.) and any third-party pledge holders (N. 26 et seq.); the debtor must also indicate if the pledged property is a family home or a shared home (N. 38 et seq.). This is explained in detail below.

## B. Realization of the pledge and the pledged property

22 In principle, the debtor must expressly request the enforcement of the pledge in the application for enforcement (see n. 23) and specify the object of the pledge (see n. 24 et seq.). Various points must be observed here, which are discussed below.

### 1. Debt enforcement request for realization of the pledge

23 In principle, the debt enforcement office only initiates debt enforcement proceedings for the realization of a pledge if the debtor submits a corresponding request for debt enforcement proceedings for the realization of a pledge. This needs to be clarified in several respects:

- It is advisable for the debtor to expressly request the enforcement for realization of the pledge in the "remarks" of the request for enforcement (specimen form no. 1). This is because the doctrine repeatedly states that the debt enforcement office may conclude that the lien realization procedure has been waived if the debtor does not expressly request the enforcement of the lien. In my opinion, however, this must be qualified to the extent that - especially in the case of laypersons - no express request is required if the debtor designates the object of the pledge in the debt enforcement request; in the event of ambiguities, the debt enforcement office must give the debtor the opportunity to improve the situation (Art. 32 para. 4 SchKG). If the debt enforcement office carries out debt enforcement proceedings for seizure or bankruptcy despite a sufficient request for realization of the pledge, the debtor can defend itself by means of an appeal (Art. 17 SchKG) and demand the debt enforcement proceedings for realization of the pledge.

- Some scholars demand that the debtor must (additionally) specify in the "remarks" whether they intend to realize a lien on real property or a pledge (Art. 37 SchKG). According to the view expressed here, it must be sufficient if the indication of the pledged object shows which type of pledge realization the debtor is seeking (see above). If there are still uncertainties about the type of realization of the pledge, the debt enforcement office must give the debtor the opportunity to clarify or improve the situation (Art. 32 para. 4 SchKG).
- If, on the other hand, there is a complete lack of reference to the object of the pledge and a request regarding the debt enforcement for realization of the pledge, the debt enforcement office carries out debt enforcement for seizure or for bankruptcy - subject, of course, to the objection of beneficium excussionis realis (see N. 10). However, the creditor does not lose the lien by initiating ordinary debt enforcement proceedings; if the ordinary debt enforcement proceedings have been suspended by a legal proposal or have lapsed due to a waiver by the debt enforcement creditor - through a formal declaration of withdrawal to the debt enforcement office - the creditor can initiate new debt enforcement proceedings (for realization of the lien). However, if the creditor is already entitled to file a request for continuation in the earlier (ordinary) debt enforcement proceedings or has already done so, further debt enforcement for the same claim is inadmissible; the debtor must raise this objection by means of an appeal or legal objection.

## 2. Information on the object of the pledge

The debtor must specify the pledged object as precisely as possible in the application for debt enforcement (it is advisable to include the type and rank of the lien and details of the location), as only the pledged objects specified in the application may ultimately be realized. It is sufficient "if it can be reason- 24 ably inferred from the information provided that the pledged object is located". The following should be added for clarification:

- If there is a collective pledge (i.e. several pledged objects are liable for one claim; see Art. 798 para. 1 CC regarding land), the debtor must include all pledged objects in the enforcement for realization of the pledge. This follows from Art. 816 para. 3 CC, which applies directly to the realization of a lien on real property and is applied analogously to the realization of a pledge. Due to the mandatory nature of Art. 816 para. 3 CC, the supervisory authorities must intervene ex officio if the enforcement is not directed against all pledged assets of the total pledge. Even if several pledged objects are liable for the claim, the realization is to be carried out "only to the extent necessary" (Art. 816 para. 3 CC, last sentence); this principle is specified in Art. 107 VZG (analogous application to the realization of pledges). If individual pledged objects are only subsidiarily liable, Art. 87 VZG must be observed.
- By law, liens on real property and chattels also include the appurtenances (Art. 805 para. 1 and Art. 892 CC). Therefore, the debtor does not have to expressly state any appurtenances in the application for debt enforcement. In the case of real estate, the appurtenances are included in the list of encumbrances (Art. 34 para. 1 lit. a VZG in conjunction with Art. 102 VZG; see N. 6).
- The rent/leasehold interest freeze (or the extension of the lien to include rent/leasehold interest) must be expressly requested; there is no ex officio order. The debtor can already apply for the interest freeze with the application for debt enforcement (in detail OK-Paydar, Art. 152 SchKG N. 23 et seq.).
- The pledge does not have to be presented to the debt enforcement office at the time the debt enforcement order is raised; the pledged object must first be brought to Switzerland for realization (see n. 4). However, it is advisable (although not mandatory) for the debt collector to state in its request where the object of the pledge is located.

25 The debt enforcement office does not examine the substantive existence of the alleged lien; the substantive assessment is carried out by the courts in the various subsequent proceedings (proceedings for the opening of legal proceedings, recognition proceedings, debt settlement proceedings or objection

proceedings). However, if the information provided by the debt collector shows that the lien does not exist or is missing, the debt enforcement office may reject the debt enforcement request. However, a rejection is inadmissible if the information provided by the debt collector makes the lien appear possible.

## C. Third-party lien holders (para. 1 lit. a)

### 1. Overview

The debtor must state the "name[s] of the third party who has created the pledge or acquired ownership of the pledged object" in the debt enforcement request (Art. 151 para. 1 lit. a SchKG). This means that any third-party pledge holders must be named in the application for debt enforcement (and, if applicable, their place of residence; see N. 29 f.). 26

Third-party lienors are owners of the pledged object who are not identical to the debtor of the pledged claim. Whether the pledged object was owned by the third party from the outset or the third party acquired ownership of it at a later date is irrelevant; according to the express provision, the third-party pledgee must be named in both cases. If the pledged object is co-owned or jointly owned by the debtor and a third party, the debtor must also state the (other) co-owners or joint owners in the request (see Art. 88 para. 4 VZG). 27

### 2. Information on the third-party lien holder

Like the enforcing creditor and the enforced debtor, the third-party lien holder must be clearly and unambiguously named in the application for enforcement, otherwise the enforcing party risks the resulting payment order being voidable or null and void. This requires explanation: 28

(i) Pursuant to Art. 151 para. 1 lit. a SchKG, the creditor must state the name of the third-party lienholder in the debt enforcement request. Whether the debt collector must also state the place of residence or address of the third-party lien holder is the subject of differing doctrinal opinions. Some scholars refer to the clear wording of the law, which only requires the name to be stated. Another part of the doctrine presupposes that the debtor states the place of residence or - if the place of residence is unknown - at least expressly refers to this fact. 29

30 It may be true that Art. 151 para. 1 lit. a SchKG only requires the "name of the third party". However, this justification falls short: the ratio legis of this provision suggests that the third-party lien holder should be named as precisely as possible so that the debt enforcement office can also serve an order for payment on them (see Art. 153 para. 2 lit. a SchKG). If the address details are missing, it is difficult to effect service. The same basic idea underlies Art. 67 para. 1 nos. 1 and 2 SchKG, which is why this provision expressly requires the debtor to state their place of residence and that of the debtor. It therefore makes sense to require information on the place of residence of the third-party lien holder in addition to the name - at least in those cases in which the debtor knows or should know the address (see, however, n. 32). If the place of residence of the third-party lien holder is unknown, an analogous application of Art. 66 para. 4 SchKG (public announcement) is appropriate.

31 (ii) The debt enforcement office must incorporate the information in the debt enforcement request into the order for payment without any changes (Art. 69 para. 2 no. 1 SchKG). Therefore, incomplete, unclear or incorrect information on the creditor or debtor involved in the debt enforcement proceedings may result in the order for payment being null and void (see Art. 22 para. 1 SchKG) - but only in cases where the deficient party designation was likely to mislead and the parties involved were actually misled. In the case of other defects that do not lead to the invalidity of the payment order, the party concerned has the right to appeal (Art. 17 SchKG); if the party fails to appeal, the defect is deemed to have been cured.

32 In principle, the above must also apply to incomplete, unclear and incorrect information about the third-party lien holder, although the debt enforcement office is regularly required to set the debtor a deadline for rectifying the deficiency (see Art. 32 para. 4 SchKG). In addition, the debt enforcement office must not place excessively high demands on the designation of the third-party lien holder, especially as it concerns information to which the debt collectors often have little or no access. In other words, even if the debt collector must in principle state the place of residence of the third-party lien holder (see n. 30 above), this can only apply where the debt collector knows or should know the place of residence. The debt enforcement office must therefore be considerate if the information on the third-party lien holder is incomplete or unclear (see n. 33 et seq. below on the legal consequences of a complete lack of information on the third-party lien holder).

## 3. Subsequent service of the payment order

The enforcing lienor must designate the third-party lien holder in the debt enforcement request so that the debt enforcement office can also serve a payment order on him (Art. 153 para. 2 lit. a SchKG). However, difficulties may arise here, as the debt enforcement office is not always aware of the third-party lien relationship at the time the debt enforcement order is raised. For example, a third-party lien may be established after the lien has been created without the lienor having been informed (see Art. 832 para. 1 CC). If the debt collector does not specify the third-party lienor in its debt enforcement request (in the knowledge or ignorance of the third-party lien relationship), this is generally not detrimental: in this case - after the third-party lien relationship becomes known - the payment order must be served on the third-party lienor retrospectively (Art. 100 para. 1 and Art. 88 para. 1 VZG; analogous application to enforcement of a pledge). This can be clarified as follows: 33

(i) Even if the service of the payment order can in principle be made up for later, the debt collector has an interest in designating (known) third-party lien holders already in the debt enforcement request. This is because the debt enforcement office only obtains an extract from the land register after the application for enforcement has been filed (Art. 99 para. 1 VZG). This can therefore lead to major delays if the debt enforcement office only serves the order for payment on the third-party lien holder at this (later) point in time; as is known, the service of the last order for payment is decisive for the calculation of the enforcement period (Art. 154 SchKG) (Art. 98 para. 1 SchKG). 34

(ii) As long as the debt enforcement office has not executed the realization (i.e. even after the application for realization has been filed), the debt enforcement office may subsequently serve the order for payment on the third-party lien holder (see Art. 100 para. 1 VZG). Before the debt enforcement office can proceed with realization, the following must be observed: Firstly, the last or subsequently served payment order must also have become legally binding. This means that any legal proposal made by the third-party lien holder must have been removed by the debt collector (of course, this also applies to all other legal proposals). Secondly, the one- or six-month minimum period for realization (Art. 154 SchKG) must have expired since service of the last payment order (Art. 98 para. 1 VZG). Of course, the third-party lien holder is permitted to waive subsequent service and the minimum period. 35

36 (iii) It is irrelevant whether the third-party lien relationship already existed prior to the initiation of the debt enforcement proceedings or was only established subsequently. In both cases, the order for payment must be served on the (new) third-party lien holder. This applies even if the debt enforcement office has already served the seller with a payment order and the seller has not lodged an objection. This does not apply to cases in which the restriction on disposal has been noted in the land register (Art. 90 and 97 VZG). In this case, the new lien holder is not entitled to (subsequent) service of the payment order (Art. 88 para. 2 and Art. 100 para. 2 VZG; see OK-Paydar, Art. 152 SchKG N. 18 et seq.).

37 (iv) If the debt enforcement office has executed the realization without serving a payment order on the third party owner, this leads to the nullity of the realization (debt enforcement act without a legally valid payment order). In this case, the awarded bid has no effect and the debt enforcement office must set a new increase date as soon as the subsequently served payment order has also become legally binding. If the minimum deadlines are not complied with, Art. 9 para. 2 and 3 VFRR must be observed; if necessary, the third party owner can file an appeal in accordance with Art. 17 SchKG (no nullity; see OK-Paydar, Art. 152 SchKG N. 14).

## D. Family home/shared home (para. 1 lit. b)

38 If the pledged property serves as a family home (Art. 169 CC) or as a shared home (Art. 14 PartG) for the debtor or the third-party pledgee (Art. 151 para. 1 lit. b SchKG), the debtor must refer to this circumstance in the application for debt enforcement.

39 As the legal text already indicates, Art. 151 para. 1 lit. b SchKG must be read together with Art. 169 CC (for Art. 14 PartG, see the comments in N. 42). According to Art. 169 CC, a spouse may only sell the family home or restrict the rights to it with the express consent of the other spouse. This is intended to prevent the "spouse who holds the rights in rem or compulsory rights to the family home from depriving the other spouse of the home that is essential to his or her life against his or her will". In order to implement this principle in debt enforcement proceedings for the realization of liens, the legislator has introduced Art. 151 para. 1 lit. b SchKG (and Art. 153 para. 2 lit. b SchKG): Accordingly, the debt enforcement office must also serve the order for payment

on the spouse and the spouse can defend himself or herself against the debt enforcement by means of a legal proposal (Art. 153 para. 2 and 2bis SchKG).

Due to the reference to Art. 169 CC, it is appropriate to interpret the term "family home" used in the SchKG in the same way as in the CC. In a nutshell, the family home is "the place where the center of marital and family life is located". In principle, this only applies to an apartment. Vacation homes and second homes are therefore not considered family homes. Furthermore, only married couples (with or without children) can invoke Art. 169 CC, whereby the mere intention to establish a family home is not sufficient - the couple must have actually moved into the home. 40

It is not always clear to the debtor whether the pledged property is a family home. For example, according to federal court case law, not every pledge on a family home requires the consent of the other spouse (see Art. 169 CC), which is why the pledgee cannot always be aware of the pledgee's residential situation. Accordingly, it may happen that the debt collector does not or cannot refer to the family home in the application for debt enforcement. However, this has no immediate consequences: The debt enforcement office can subsequently serve the order for payment on the other spouse in the course of the debt enforcement proceedings (Art. 88 para. 1 and Art. 100 para. 1 VZG; the comments on third-party lien holders [N. 33 et seq.] also apply mutatis mutandis here). If a change of use occurs in the course of the debt enforcement proceedings (i.e. the pledged property is now used as a family home), the payment order must also be served retrospectively. The (non-enforced) spouse can effect service of the payment order by means of a SchKG complaint. If the debt enforcement office has carried out the realization although the debt enforcement office has not served the (non-operated) spouse with an order for payment, this will result in the realization being null and void (debt enforcement action without a legally valid order for payment). 41

The term "joint home" (Art. 14 PartG) essentially corresponds to the description of the family home (N. 40). The above explanations (nos. 38-41) also apply mutatis mutandis to pledged properties that serve as a joint residence. Furthermore, Art. 151 para. 1 lit. b SchKG does not apply to other forms of communities of interest between spouses or registered partners; in particular, the (non-operated) spouse does not have to be named in the application for debt enforcement if the debt enforcement relates to a pledged property that is 42 solely an agricultural business operated jointly by both spouses (Art. 40 BGBB).

## IV. DUTY TO NOTIFY IN THE EVENT OF SUBSEQUENT PLEDGING (PARA. 2)

43 Art. 151 para. 2 SchKG imposes an obligation to notify the enforcing (preceding) pledgee in the debt enforcement proceedings for the realization of a pledge if the pledged object is encumbered with a subsequent pledge (Art. 886 CC): The enforcing (preceding) lienor must notify the subsequent lienor of the initiation of the debt enforcement proceedings (for special cases, see N. 45). The duty to notify also applies in the case of subsequent pledging of claims and other rights, although Art. 151 para. 2 SchKG makes no express reference to Art. 903 CC (see, however, Art. 899 para. 2 CC, which refers to the provisions on pledges). In contrast, in debt enforcement proceedings for the realization of a lien on real property, the other parties are notified by means of a special official notice (see Art. 139 SchKG and Art. 30 and 102 VZG).

44 The duty to notify only exists if a subsequent lien has been created. In addition to the general requirements (pledge agreement and a claim to be secured), this requires two things (Art. 886 CC; similar provision in Art. 903 CC):

- Firstly, the (preceding) pledgee must have been notified in writing (Art. 12 et seq. CO) of the subsequent pledge. In principle, the pledgee is obliged to give notice, which is clear from the French legal text. However, the pledgee can authorize the subsequent pledgee to notify the prior pledgee himself. For the sake of clarity, it should be noted that the notification obligation under Art. 886 CC should not be confused with that under Art. 151 para. 2 SchKG: the former provision applies to the pledgee, whereas the latter obliges the (enforcing) preceding pledgee.
- Secondly, the pledgee must instruct the (preceding) pledgee to hand over the pledge to the subsequent pledgee after it has been satisfied. However, the consent of the preceding pledgee is not required.

The enforcing (preceding) pledgee (sender) must notify the subsequent pledgee (addressee) of the initiation of the enforcement proceedings. This requires clarification in two respects: 45

- If several subsequent lien creditors exist, then the enforcing (preceding) lien creditor must notify all subsequent lien creditors.
- According to the wording of Art. 151 para. 2 SchKG, only the enforcing (preceding) lienor has a duty to notify. Therefore, some scholars are of the opinion that the enforcing subsequent lien creditor does not have to notify the preceding lien creditor(s). However, this part of the doctrine points out that the (preceding) lienor - as soon as it becomes aware of the debt enforcement - must notify the subsequent lienors who have priority over the pursuing subsequent lienor (analogous to Art. 151 para. 2 SchKG). The other part of the doctrine is of the opinion that the enforcing subsequent lien creditor is obliged to notify the preceding lien creditors. Due to the comparable interests, it is justified in my opinion to impose a duty of notification on the subsequent lienor (also vis-à-vis the preceding lienors) by way of a telelogical extension if she initiates debt enforcement proceedings.

The notification is not bound to any particular form and can therefore be made in writing, orally or in another form. Since failure to notify may have certain consequences (see n. 48), it is advisable to notify in a form that can be proven (e.g. by registered letter). 46

The law does not specify the time at which the enforcing lienor must give notice. Art. 151 para. 2 SchKG only states that it must inform the subsequent lienor of the initiation of debt enforcement - no exact point in time is specified. However, it is advisable for the pursuing (preceding) lienor to notify the debtor promptly after the debt enforcement proceedings have been initiated, otherwise it runs the risk of becoming liable for damages (see below). 47

Failure to notify (or late notification) has no effect on the debt enforcement proceedings. On the other hand, there are various references in the doctrine that the enforcing lienor could be liable to pay damages to the subsequent lienor if it (the enforcing party) has failed to give notice. In principle, this is not objectionable, especially since the failure to notify (or even late notification) can result in the subsequent lienor no longer being able to assert its rights (see n. 49). However, the question arises as to the legal basis on which 48 this claim for damages can be based - apart from a few exceptions, this is not addressed in the doctrine. Below are some thoughts on this:

- As a rule, there is no contract between the prior and subsequent pledgee, which means that non-contractual liability under Art. 41 CO comes into consideration in the first instance. However, it is difficult to assess whether all liability requirements of Art. 41 CO are actually met in the event of a failure to notify. The main question is what constitutes unlawfulness in the event of a breach of the duty to notify: according to the view expressed here, it can be argued that Art. 151 para. 2 SchKG is a protective provision, as it is intended - at least in a broad sense - to protect assets (see also n. 49). If, on the other hand, the protective nature of Art. 151 para. 2 SchKG is denied, it is not clear from what unlawfulness can be derived in these cases; in particular, the subsequent pledgee cannot rely on Art. 2 CC, as this provision can only serve as a protective norm in exceptional cases (which, in my opinion, are not present here).
- In addition to non-contractual liability, the subsequent lienor could also rely on Art. 97 para. 1 CO, even if - as mentioned - no contractual relationship exists. This requires a look at the subsequent pledgee's claim for restitution against the prior pledgee: According to some doctrine, a so-called "statutory obligation" exists between these two pledgees, to which Art. 97 para. 1 CO applies by analogy. If the preceding pledgee breaches its (statutory) duty to surrender, the subsequent pledgee can assert a claim for damages against the preceding pledgee. If this idea is transferred to Art. 151 para. 2 SchKG, then the subsequent pledgee - based on this statutory obligation - has the option of claiming damages from the enforcing (preceding) pledgee in the event of a breach of the duty of notification (analogous to Art. 97 para. 1 CO).

49 The purpose of the duty to notify or the ratio legis of Art. 151 para. 2 SchKG is to enable the subsequent pledgee to protect its rights to the pledged property by means of notification. This includes the following in particular:

- In order to prevent the realization of the pledge, the subsequent pledgee has the option of settling the (third-party) debt of the debtor being enforced against the preceding pledgee (so-called redemption/redemption). As a result, the subsequent pledgee acquires both the claim of the preceding pledgee and the latter's lien (subrogation; Art. 110 no. 1 CO). In other words, the subsequent lien creditor assumes the creditor status (including ancillary rights) of the preceding lien creditor (so-called retroactive effect). Art. 827 CC must be observed for the owner's right to redeem the mortgage.

- The subsequent lienor may have to assert their lien as part of an objection procedure (Art. 155 para. 1 in conjunction with Art. 106 et seq. SchKG). The basic prerequisite for conducting the objection proceedings is the filing of the third-party claim (Art. 106 para. 2 SchKG), which is why timely notification of the initiation of debt enforcement proceedings is advisable. The primary purpose of the objection proceedings is to clarify the alleged rights of external third parties (in this case the following pledgee) to the pledged object. In addition, any ranking disputes regarding various liens must also be dealt with in these proceedings.
- Finally, the subsequent lienor may have the need to purchase the pledged property at public auction (Art. 125 et seq. SchKG). In this context, it should be noted that the principle of cover must always be observed at an auction. According to this principle, the bid may only be accepted if the bid exceeds the amount of any claims ranking prior to the claimant creditor (Art. 126 para. 1 SchKG). The creditor at whose request the increase was ordered is deemed to be the "creditor pursuing the claim" (see Art. 105 para. 1 VZG). "Positively formulated, the realization proceeds must therefore only [...] exceed the sum of those lien claims whose ranking is higher than the highest-ranking claim for which the realization was requested." This means the following for the constellation with one preceding and one subsequent pledgee: If the preceding pledgee has initiated the debt enforcement for realization of the pledge and demanded realization, the principle of coverage has no effect on the minimum surcharge price; from the perspective of the debtor (preceding pledgee), there are no preceding claims. The situation is different if the subsequent lienor seeks to enforce the realization of the lien: In this case, the principle of cover must be observed.

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COMMENTARY ON

# Art. 152 DEBA

A commentary by Ramin Paydar

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**B. Payment order**

**1. Content. Notice to tenants and lessees**

**Art. 152**

[1] On receipt of the application for debt enforcement, the debt enforcement office shall issue an order for payment in accordance with Article 69, but with the following special features:

1. The payment period to be set for the debtor is one month in the case of a pledge, six months in the case of a mortgage.

2. The threat is that if the debtor neither complies with the payment order nor files an objection, the pledge will be realized.

[2] If there are rental or lease agreements on the property and the enforcing pledgee demands that the lien be extended to include the

rental or leasehold interest claims (Art. 806 ZGB), the debt enforcement office shall notify the tenants or leaseholders of the increase in the debt enforcement and instruct them to pay the rental or leasehold interest that falls due to the debt enforcement office.

# CONTENT

# I. OVERVIEW

1 Art. 152 SchKG regulates two things:

- After receipt of the debt enforcement request, the debt enforcement office issues the payment order without undue delay (Art. 69 para. 1 and Art. 152 para. 1 SchKG) in order to serve it on the debtor being pursued and on any co-debtors (Art. 153 SchKG; see also Art. 71 para. 1 SchKG). The content of the payment order is primarily determined in accordance with Art. 69 para. 2 SchKG; Art. 152 para. 1 SchKG provides for some special features for the enforcement of a pledge (see the marginal note; N. 2 et seq.).
- If there are rental or lease agreements on the pledged property, the enforcing pledgee can apply for a so-called rent/leasehold freeze; the tenants/leaseholders must be notified of this (Art. 152 para. 2 SchKG; n. 23 et seq.).

# II. CONTENT OF THE PAYMENT ORDER (PARA. 1)

## A. Preliminary remarks

2 Art. 69 para. 2 and Art. 152 para. 1 SchKG govern the content of the order for payment. First of all, the order for payment must contain the details of the debt enforcement application (Art. 69 para. 2 no. 1 SchKG): Art. 67 and Art. 151 para. 1 SchKG specify to the enforcing pledgee what information she must include in the request (in detail OK-Paydar, Art. 151 SchKG N. 21 et seq.); in particular, the enforcing party must specify the object of the pledge (see N. 5 et seq.) and the persons involved (enforcing pledgee, enforced debtor and any third-party pledgees). Furthermore, the order for payment must contain the request that the debtor being pursued must satisfy the debtor for the claim and debt enforcement costs within a certain period of time (Art. 69 para. 2 no. 2 SchKG); in deviation from the ordinary initiation procedure, the law stipulates longer payment periods for debt enforcement for the realization of liens (Art. 152 para. 1 no. 1 SchKG; see n. 7 et seq.). The order for payment must also state that the debtor may lodge an objection within ten days of service of the order for payment (Art. 69 para. 2 no. 3 SchKG). Finally, the order for payment must contain the threat that the pledged property will be realized if the

debtor does not comply with the order for payment or does not lodge an objection (Art. 152 para. 1 no. 2 SchKG; see n. 16 f.).

The debtor can complain about deficiencies in the content of the payment order by means of an appeal in accordance with Art. 17 SchKG. In exceptional cases, a defect may lead to the order for payment being null and void. 3

Model form no. 3a (realization of pledge) or 3b (realization of mortgage) must be used for the payment order. 4

## B. Object of the pledge

The enforcing pledgee must describe the object of the pledge as precisely as possible in its debt enforcement request (see OK-Paydar, Art. 151 SchKG N. 24) so that the debt enforcement office can incorporate this information into the order for payment. If the order for payment lacks information on the pledged object, its subsequent realization is inadmissible. 5

In principle, the debt enforcement office does not examine the material existence of the alleged lien (see also OK-Paydar, Art. 151 SchKG N. 25). 6

## C. Payment deadlines (para. 1 no. 1)

### 1. Preliminary remarks

In ordinary debt enforcement proceedings, the payment period to be set is twenty days (Art. 69 para. 2 no. 2 SchKG). The law provides for longer payment periods in debt enforcement proceedings for the realization of liens (Art. 151 para. 1 no. 1 SchKG): 7

- one month in the enforcement of liens (cf. Art. 37 para. 2 SchKG)
- six months for the realization of real property liens (cf. Art. 37 para. 1 SchKG)

The longer payment periods in debt enforcement for lien realization are justified by the fact that the period between service of the payment order and the realization stage is shortened (the attachment stage is omitted in lien realization proceedings). The debtor should also have sufficient time to pay off the claim of the enforcing creditor and thus avert the realization of the pledged object. Accordingly, the debt collector cannot take any further enforcement action before the payment deadline (cooling-off period) has expired. In other 8 words, the application for realization is only admissible after the deadline has expired (see Art. 154 para. 1 SchKG; see also n. 14).

## 2. Start of the time limit

9 Service of the payment order triggers the payment period (see also Art. 154 para. 1 SchKG). The start of the time limit is generally determined in accordance with Art. 142 para. 1 and 2 CPC (Art. 31 SchKG). Since these are monthly time limits, Art. 142 para. 2 CPC applies exclusively - at least according to the view expressed here (detailed N. 10); the time limit therefore generally begins to run on the day the payment order is served. The following should be added:

- According to the case law of the Federal Supreme Court, the service of the payment order is a debt enforcement act within the meaning of Art. 56 SchKG. Therefore, service during the grace period (or blocking period; see the list in Art. 56 SchKG) only takes legal effect on the first day after its expiry (deferred effectiveness); therefore, according to the view expressed here, the period begins to run on the first day after expiry of the grace period (Art. 142 para. 2 CPC; example: service of the payment order on Sunday - effectiveness of the service and start of the period on Monday). The above does not apply to the cases regulated in Art. 57 SchKG (the debtor is in military, protective or civilian service) and in certain constellations of Art. 59 SchKG; in these cases, acts of debt collection during the legal standstill are null and void. If the legal standstill has already lasted three months, the payment order must still be served in the realization of the lien (Art. 57b para. 2 SchKG), i.e. the time limit can begin to run during the legal standstill in these cases.
- If, contrary to the view expressed here, a cumulative application of Art. 142 para. 1 and 2 CPC is affirmed - as argued by some scholars (see n. 10), not only the daily time limits but also the monthly time limits begin to run on the day after service of the payment order (e.g.: service on February 15, 2023 - start of time limit on February 16, 2023). The start of the time limit also falls on the day after service if this day (the first day of the time limit period or the day after service) is a Saturday, Sunday or a public holiday recognized by the state. For service on a Sunday or a nationally recognized public holiday (with the exception of Saturdays, which are not covered by Art. 56 no. 1 SchKG) or during other grace periods, the aforementioned

lemma applies: unless the act of debt enforcement is null and void, service during the grace period does not take legal effect until the day after its expiry; consequently, the time limit - according to this part of the doctrine - begins to run on the second day after the end of the grace period (Art. 142 para. 1 CPC; e.g.: service of the order for payment on Sunday - effectiveness of service on Monday - start of time limit on Tuesday).

- If subsequent service is made on a third-party lien holder or - in the case of a family home/joint residence - on a spouse/registered partner, the service of the last payment order is decisive for the start of the time limit (see Art. 98 para. 1 and Art. 100 para. 1 VZG; see OK-Paydar, Art. 151 SchKG N. 35).

## 3. End of the time limit

The payment periods under Art. 152 para. 1 no. 1 SchKG are structured as monthly periods (one month or six months). Accordingly, the period ends in the last month on the day that bears the same number as the day on which the period began to run (Art. 142 para. 2 CPC and Art. 31 SchKG; see also N. 9). This requires the following clarification: 10

- The calculation of monthly time limits is disputed in doctrine and - in the context of Art. 142 CPC - has not (yet) been conclusively clarified by the highest courts. On the one hand, the wording of Art. 142 paras. 1 and 2 CPC suggests an accumulation of these paragraphs: If the order for payment (in the enforcement of a lien) is served on February 15, 2023, for example, the one-month period begins on February 16, 2023 (para. February 2023 (para. 1; "Time limits [...] shall begin to run on the following day.") and ends on March 16, 2023 at midnight (para. 2; "it [the time limit] shall end in the last month on the day bearing the same number as the day on which the time limit began to run."). On the other hand, the system points in a different direction: In Swiss law, the last day of the monthly time limit usually bears the same number as the day of the event triggering the time limit (e.g. Art. 77 para. 1 no. 3 CO, Art. 31 SCC, Art. 45 BGG and Art. 38 ATSG); thus, in the above example, the time limit would already end on March 15, 2023 at midnight. This calculation of the time limit is also in line with the European Convention on the Calculation of Time Limits (SR 0.221.122.3) and is supported by the teleological interpretation element: A cumulative application of Art. 142 para. 1 and 2 CPC would lead to an extension of the one-month time limit by one day, which does not correspond to the meaning and purpose of this standard. Both the calculation rules contained in para. 1 and para. 2 of Art. 142 CPC are intended solely to ensure that only days that are fully available are counted for time limits; cumulation would therefore lead to an inappropriate privilege in the case of monthly time limits - compared to time limits determined by days. Since there are no indications to the contrary in the legislative history, the conclusion that can be drawn here is that cumulation should be rejected; in the above example, the deadline therefore correctly ends on March 15 (not 16), 2023 at midnight.

- If the last day of a time limit falls on a Saturday, Sunday or nationally recognized holiday, the time limit ends on the next working day (Art. 142 para. 3 CPC). However, this only applies if the end of the time limit does not also fall during the debt enforcement vacations or the legal standstill (see the following lemma). For the sake of completeness, it should be noted that the closed periods within the meaning of Art. 56 no. 1 SchKG (namely Sundays and nationally recognized public holidays) are not covered by the scope of application of Art. 63 SchKG; this means that the deadline is not extended by three days if the deadline ends on a Saturday, Sunday or nationally recognized public holiday.
- If the end of the time limit falls during the debt enforcement vacation or legal standstill, the time limit is extended until the third day after the end of the vacation or legal standstill; Saturdays, Sundays and nationally recognized public holidays are not counted when calculating the time limit (Art. 63 SchKG). In other words, the time limit is extended "until the end of the third working day." If the last day of the debt enforcement vacation or the legal standstill is a Saturday, Sunday or a public holiday recognized by the state, there is no cumulative application of Art. 63 SchKG and Art. 142 para. 3 CPC (see above). Therefore, a debt enforcement vacation and legal standstill can also end on a Saturday, Sunday or state-recognized holiday, with the result that the additional period runs from the next working day. Example: If the debt enforcement vacations end on Saturday, the additional time limit runs from Monday (not Tuesday) and ends on Wednesday.

## 4. Compliance with the time limit

Compliance with the time limits is governed by Art. 143 CPC (Art. 31 SchKG). 11
This means that the debtor being pursued must pay the amount claimed (including debt enforcement costs; Art. 68 SchKG) by the last day of the deadline (by midnight) at the latest in order to meet the payment deadline. In the case of a bank payment, the account must be debited on the last day of the deadline in order to meet the deadline (see Art. 143 para. 3 CPC). Two things should be added:

- The debtor can pay the amount claimed (including debt enforcement costs) to the creditor or to the debt enforcement office for the creditor's account (Art. 12 para. 1 SchKG) and thus settle the claim. Only in the latter case does the payment lead to the immediate termination of the debt enforcement proceedings (Art. 12 para. 2 SchKG); in the case of payment to the creditor, however, the debtor must apply to the court for the debt enforcement proceedings to be set aside in accordance with Art. 85/85a SchKG in the event of a dispute. Payment to the debt enforcement office incurs a fee (Art. 19 GebV SchKG), which forms part of the debt enforcement costs and is therefore to be borne by the debtor (Art. 68 SchKG).
- If the debtor does not pay before the payment deadline expires, this has no immediate consequences for him. They can continue to repay their debts after the payment deadline has expired and cause the debt enforcement proceedings to be terminated (Art. 12 para. 2 SchKG) or annulled (Art. 85 and 85a SchKG). However, the following should be noted: The payment deadlines (Art. 152 para. 1 no. 1 SchKG) correspond to the minimum deadlines for realization (Art. 154 SchKG; the suspension of deadlines regulated therein does not apply to the minimum deadlines). Accordingly, if the payment order is legally binding, the creditor can submit the application for realization as soon as the payment or minimum deadline for realization has expired. Once the deadline has expired, there is therefore only a short period of time to prevent the realization of the pledged property.

## 5. Binding nature of the deadline

The payment or minimum time limit (Art. 154 or Art. 152 para. 1 no. 1 SchKG; 12
cf. no. 11 on the interaction of these two time limits) serves solely the interests of the debtor being pursued. Therefore, the debtor - in contrast to the enforcing creditor (see below) - is not bound by these time limits (see Art. 33 para. 3

SchKG). If the debtor is also the lien holder, he/she can request the realization of the pledge even before the expiry of the payment or minimum period (Art. 124 para. 1 in conjunction with Art. 156 para. 1 SchKG); this is also possible in the realization of the mortgage, but (additionally) requires the express consent of all attachment and mortgage creditors (Art. 133 para. 2 in conjunction with Art. 156 para. 1 SchKG).

13 Third-party lien holders and spouses/registered partners are free to waive compliance with the payment or minimum deadline for realization in the event of subsequent service (within the meaning of Art. 100 para. 1 VZG).

14 In contrast, the enforcing creditor is bound by the payment or minimum deadline for realization. It is therefore not entitled to submit the application for realization before the deadline expires. If it nevertheless submits the request before expiry, the debt enforcement office will return the request with the remark "premature, not admissible until ..." (Art. 9 para. 2 VFRR). This does not apply to enforcement requests that reach the debt enforcement office no more than two days too early: The debt enforcement office accepts these; however, the date of receipt is deemed to be the date from which the request is admissible (Art. 9 para. 3 VFRR). If the debt enforcement office complies with an enforcement request made too early, the debtor is entitled to appeal in accordance with Art. 17 SchKG (no nullity). By failing to lodge an appeal, the debtor in possession waives compliance with the time limits.

15 The payment and minimum time limits for realization are cooling-off periods that can neither be extended nor restored (see Art. 33 SchKG).

## D. Threat of realization of the pledge (para. 1 no. 2)

16 The debtor being pursued must be threatened in the order for payment that the pledged asset will be realized if he neither complies with the order for payment nor files an objection (for systemic reasons, Art. 69 para. 2 no. 4 SchKG contains a different provision for ordinary debt enforcement proceedings). As soon as the enforcing creditor has obtained a legally binding payment order in pending debt enforcement proceedings and complies with the minimum and maximum time limits pursuant to Art. 154 SchKG, it can submit the request for realization.

Consequently, the debtor can avert realization by satisfying the creditor (by paying the debt enforcement claim; see N. 11) or by filing an objection within the deadline (Art. 74 SchKG). The following should be added to the latter: 17

- In debt enforcement proceedings for the realization of a lien, the legal objection may be used to contest not only "the existence, scope or due date of the claim but also the existence of the lien". Unless otherwise stated in the legal proposal, the legal proposal relates to both the claim and the lien (cumulative). This provision is expressly set out in Art. 85 para. 1 VZG for the realization of liens on real property. There is no such provision for the realization of liens. However, due to the similarity of interests, it is justified to apply Art. 85 para. 1 VZG analogously in the realization of liens; a similar idea is contained in Art. 74 para. 2 SchKG, which is why an (analogous) application of this provision leads to the same result. If an analogous application is denied, in my opinion there is a natural/actual presumption that the legal proposal relates to the claim and the lien.
- If the debtor wishes to contest either only the lien or the claim (alternatively), he must expressly refer to this in the objection (see Art. 74 para. 2 SchKG).
- In addition to the debtor being pursued, any co-debtors may also lodge an objection (Art. 153 para. 2 and 2bis SchKG).

## E. For the pledgee: reference to restriction on disposal (Art. 90 VZG)

In debt enforcement proceedings for attachment, the debtor is prohibited under penalty of punishment from disposing of the attached assets without the authorization of the debt enforcement office (Art. 96 SchKG). There is no corresponding provision in debt enforcement proceedings for the realization of pledges. Consequently, the pledge holder can dispose of the pledged property without restriction even after the initiation of debt enforcement proceedings for realization of the pledge. In the case of lien enforcement, the reservation of a restriction on disposal in the land register (Art. 960 para. 1 no. 1 CC) provides - at least partial - relief: Under certain conditions (see para. 20 below), the lienor conducting the enforcement proceedings can request the debt enforcement office to register a restriction on disposal with the land register office for reservation (Art. 90 para. 1 VZG). The debt enforcement office must 18 inform the debtor of this option in the order for payment (Art. 90 para. 2 VZG). This requires explanation in four respects:

19 (i) Art. 90 VZG governs the optional restriction on disposal. This must be distinguished from the mandatory restriction on disposal under Art. 97 VZG. As soon as the debtor has filed the request for realization, the debt enforcement office must ex officio register a restriction on disposal pursuant to Art. 960 CC for priority notice in the land register (Art. 97 para. 1 VZG) - subject to the proviso that there is not already a priority notice pursuant to Art. 90 VZG (Art. 97 para. 2 VZG). The optional restriction on disposal therefore comes into play in cases in which the debtor seeks a restriction on disposal before the six-month payment or minimum period (Art. 152 para. 1 no. 1 SchKG; Art. 154 para. 1 SchKG) has expired. This may be necessary if the pledge holder wishes to sell the pledged property during the ongoing debt enforcement proceedings in order to delay the proceedings (see Art. 88 and 100 VZG; see n. 21 and OK-Paydar, Art. 151 SchKG n. 33 et seq.).

20 (ii) The debtor can only demand the priority notice of a restriction on disposal in the context of debt enforcement proceedings for the realization of a lien on real property; the realization of a lien on property does not provide such protection. In addition, the following is a prerequisite (alternative):

- The (co-)operated parties have not lodged a legal objection or they have not lodged the legal objection in due form or time (Art. 90 para. 1 no. 1 VZG).
- The validly lodged objection has been finally disposed of by judgment (proceedings for the opening of legal proceedings or ordinary proceedings) or by withdrawal (Art. 90 para. 1 no. 2 VZG). Provisional opening of legal proceedings is also sufficient; it is irrelevant whether the twenty-day period for the action for revocation is still running or whether such an action is already pending (Art. 83 para. 2 SchKG). In other words, a priority notice can be requested in the case of a granted provisional legal opening even if there is no legally binding payment order.

21 (iii) The restriction on disposal is "given effect by the priority notice against any rights acquired later" (Art. 960 para. 2 CC). However, this does not mean that the registered restriction on disposal prevents the owner from disposing of his property (in contrast to the land register block); accordingly, the priority notice is not intended to secure the liability substrate. On the other hand, if a

restriction on disposal is registered, a third party who acquires rights to the pledged property must accept the continuation of the debt enforcement proceedings. This is advantageous for the debtor insofar as - in terms of time - a disposal of the pledged property during the ongoing debt enforcement proceedings has no effect. This needs to be explained:

- In principle, the third-party lien holder is deemed to be a co-operator. The payment order must therefore be served on him, against which he can lodge an objection (Art. 153 para. 2 lit. a SchKG). In principle, it does not matter whether the third-party lien relationship already existed before the debt enforcement proceedings were initiated or was only established subsequently (see the exception below). As long as the debt enforcement office has not executed the realization (i.e. even after the application for realization has been filed), the order for payment can be served on the third-party lien holder at a later date (see Art. 88 para. 1 and Art. 100 para. 1 VZG; see OK-Paydar, Art. 151 SchKG N. 33 et seq.). However, subsequent service can lead to major delays: On the one hand, the payment order issued at a later date must also become legally binding before enforcement can take place. On the other hand, the six-month minimum period (Art. 154 para. 1 SchKG) only begins to run when the last payment order is served (Art. 98 para. 1 VZG).
- However, subsequent service of the payment order is only required if there is no registered restriction on disposal (Art. 88 para. 2 VZG; Art. 100 para. 2 VZG). If a third party acquires the pledged property after the restriction on disposal has been noted in the land register, this third party is not to be treated as a co-owner. The (new) third-party lien holder and - if it is a family home/joint residence - their spouse/registered partner can therefore not raise a legal objection and must accept the continuation of the debt enforcement proceedings (see Art. 960 para. 2 CC).
- In the case of the subsequent establishment of a family home/shared apartment ("change of use"), however, it is disputed whether or not the spouse/registered partner is one of the co-occupants in the case of a registered restriction on disposal. The middle solution advocated by Kren Kostkiewicz is convincing: as long as a request for realization has not been filed, any "conversion of use" must be taken into account; i.e. the debt enforcement office must subsequently serve the spouse/registered partner with a payment order. If a "change of use" occurs after the application for

realization has been filed, no subsequent service on the spouse/registered partner is required.

22 (iv) Prior notices that violate Art. 90 or 97 VZG are not null and void, but can only be contested with an appeal pursuant to Art. 17 SchKG.

## III. RENT/LEASEHOLD FREEZE (PARA. 2)

### A. Overview

23 The scope of the lien (to be distinguished from the scope of the security; see OK-Paydar, Art. 151 SchKG N. 6 f.) deals with the question of which objects/claims form the basis of the lien and can therefore be realized in the event of the debtor's default. In the case of mortgages, the scope of the lien is determined in accordance with Art. 805 et seq. CC: First and foremost, the security right over real property comprises the property together with its components and appurtenances (Art. 805 para. 1 CC). In the case of rented/leased properties (see N. 25), the lien also extends to the rent/leasehold interest claim "that has accrued since the commencement of proceedings for the realization of the mortgage or since the opening of bankruptcy proceedings against the debtor until realization" (Art. 806 para. 1 CC). However, this is not unconditional: the lienor must expressly request the debt enforcement office to extend the lien (Art. 152 para. 2 sub-sentence 1 SchKG; N. 28) and make an advance on costs (N. 30). If the requirements are met, the debt enforcement office notifies the tenants/leaseholders (or other interest debtors; see N. 25) of the extension of the debt enforcement and instructs them to pay the rent/leasehold interest that falls due to the debt enforcement office (so-called rent/leasehold interest freeze; Art. 152 para. 2 sub-sentence 2 SchKG; see N. 39).

### B. Scope of application

24 (i) Outside of bankruptcy or probate proceedings, the lienor can only demand that the lien be extended to claims for rent/leasehold interest in debt enforcement proceedings for the realization of real property (see Art. 41 SchKG). The following should be added:

- In principle, there is no provision for an extension of the lien and interest freeze in debt enforcement proceedings for the realization of a lien on real property (cf. Art. 152 para. 2 SchKG, which relates to real property). Thus, by law, the security right of lien only covers natural fruits; civil fruits (namely rental/lease interest) are not covered by the lien (see Art. 892 para. 2 CC). However, it is permissible to contractually extend the lien to the civil fruits; whether an interest freeze can also be ordered in these cases is unclear. In my opinion, there are no apparent reasons that would exclude an analogous application of Art. 152 para. 2 SchKG in the enforcement of a pledge from the outset.

- If the parties have established a lien on a mortgage note (so-called indirect security), debt enforcement proceedings for the realization of a pledge must generally be initiated; in this case, no interest freeze can be ordered (see above). However, the parties can reach a different agreement in the pledge agreement (right of collection and termination) so that the pledgee has the option of directly initiating debt enforcement for realization of the mortgage; this opens the way for an interest freeze to be ordered.
- An extension of the lien under Art. 806 CC is excluded in debt enforcement proceedings for seizure. However, it should be noted that the current rent and leasehold interest is deemed by law to be attached together with the property (see Art. 102 SchKG and Art. 14 and Art. 15 para. 1 lit. b VZG); in this case, however, all attachment creditors benefit from the accruing rent and leasehold interest.

(ii) Art. 805 CC makes natural fruits subject to lien; Art. 806 CC regulates the 25
same for civil fruits. The law expressly mentions rent and leasehold interest as civil fruits. However, the statement that an extension is only possible if there is a rental or lease agreement is imprecise. This requires clarification in several respects:

- First and foremost, the extension of lien concerns the rental/leasehold interest income earned by the lien holder under a rental/leasehold agreement (Art. 253 et seq. and Art. 275 et seq. CO). Only the interest actually payable is covered by the lien. The lien even extends to rent/leasehold interest claims that violate statutory provisions (e.g. Art. 269 et seq. CO) as long as the tenant/leaseholder has not obtained a (court) reduction of the interest.
- The remuneration paid for the granting of a right of use in rem also constitutes civil fruits within the meaning of Art. 806 CC; the lien can therefore also be extended to this income. In particular, this includes income from

usufruct (Art. 745 et seq. CC), residential rights (Art. 776 et seq. CC) and building rights (Art. 779 et seq. CC; building right interest). The explanations on rent/leasehold interest therefore also apply mutatis mutandis to the remuneration for rights of use in rem (for reasons of readability, no terminological differentiation is made below).

- A loan for use pursuant to Art. 305 et seq. CO is naturally free of charge; accordingly, an extension of the lien is out of the question. The reimbursement of costs owed by the borrower (Art. 307 para. 1 CO) is not a civil fruit within the meaning of Art. 806 CC, which is why an extension is excluded. If the debtor uses the pledged property himself, an extension is also not possible.
- According to the Federal Supreme Court, claims of the hotel owner against his hotel guests and restaurant visitors are not subject to lien. Whether this also applies to other mixed legal relationships is questionable. Nevertheless, it can be stated that it will generally be possible to exclude the rent component (see Art. 93 para. 2 VZG).
- The situation is unclear in the case of sub- and third-party relationships: According to the minority opinion, the lien also includes the subtenancy/sublease interest, whereby the mortgagee can nevertheless not have double recourse to the interest payment; the tenant/sublandlord "whose sublease income is confiscated by the creditor of his head landlord can bring a corresponding claim for damages to offset against his rent debt" (same result for the sublease relationship). Another part of the doctrine takes the opposite view and denies the extension to subletting/subleasehold interest. According to the Federal Supreme Court, the hotel owner's claims against the gerant who manages the hotel for the landowner (third-party relationship) are not subject to lien liability.

26 (iii) The lien only covers - from a temporal perspective - the current rent/lease interest (but see n. 29). Those rental/leasehold interests that accrue before the realization of the lien or after the realization (or after the conclusion of the realization of the lien; cf. n. 37) are not covered by the lien (cf. Art. 806 para. 1 CC).

27 (iv) From a personal point of view, only the enforcing mortgagee has the privilege to demand the extension of the lien. A non-enforcing mortgagee is not

entitled to do so; accordingly, she is not entitled to any interim payments (see Art. 95 para. 1 VZG; see n. 42).

## C. Prerequisites

Two things are required - in addition to the existence of rental/lease income (or other civil fruits; see N. 25) - in order for an extension of the lien and ultimately a rent/leasehold interest freeze to occur in the debt enforcement proceedings for realization of the lien (see N. 24): 28

(i) Request of the enforcing lienor: The enforcing party must expressly request the extension of the lien; the extension does not take place - in the enforcement for realization of the lien - by operation of law. It can already do this in the application for debt enforcement, but it is also permissible to make the request for extension at a later date. This requires explanation: 29

- If the debtor requests the extension in the debt enforcement request, the rent/lease interest falling due from that point in time is subject to the lien (see Art. 91 para. 1 VZG; but see the comment under the 4th lemma regarding overdue interest).
- If the debtor submits the request at a later date, there is no retroactive effect. The extension only takes effect from the time at which the debtor requests the extension; consequently, the lien only covers the rent/lease interest that becomes due after the time of the request (see above). It is therefore advisable for the debtor to apply for the extension at an early stage - ideally together with the application for debt enforcement.
- The debtor can only request the extension at a later date if he has not irrevocably waived it. A waiver can be express or implied, whereby the lack of a request in the debt enforcement application alone does not constitute an (irrevocable) waiver. In other words, the debtor has the option of waiving the extension only for the time being. As soon as the extension of the lien has taken place, the debtor can only waive the extension for future rent/lease interest.
- The question arises as to whether the lien can also be extended to cover rent/leasehold interest that was already due before the application was filed but has not yet been paid by the debtor - who is in default (overdue rent/leasehold interest). Dürr is of the opinion that the ratio legis of Art. 91 para. 1 VZG would allow the lien to be extended to overdue rent/lease in-

terest. However, this is contradicted by the clear wording of Art. 91 para. 1 VZG, which is why an extension to overdue rent/leasehold interest should be rejected.

- There are isolated references in the doctrine to the effect that the lien on rent/leasehold interest can be asserted independently - i.e. without realizing the property - in the enforcement of the lien. This does not mean that a request for lien enforcement that only relates to the rent/leasehold interest is admissible; the statutory lien on the rent/leasehold interest must be asserted together with the underlying lien in the context of a lien enforcement (so-called accessoriness; see Art. 806 para. 1 CC and N. 24). Correctly, "independent" can only (but still) mean that it is not mandatory for the encumbered property to be realized so that the mortgagee can satisfy itself from the accrued rent/leasehold interest (see n. 37). If the rental/lease interest received (and/or other income) is already sufficient to cover the debt enforcement claims and costs, there is no need to realize the pledged property; this is also important in connection with the payments on account pursuant to Art. 95 VZG (see n. 42 et seq., in particular n. 44). Reference should be made to Art. 111 para. 2 VZG, according to which even if the property is realized without result, the rental/leasehold interest income is allocated to the lien claimant.

30 (ii) Payment of the advance on costs: The previous version of Art. 91 para. 1 VZG explicitly required the payment of an advance on costs for the rent/leasehold interest freeze. There is no such reference in the current version of Art. 91 para. 1 VZG. Nevertheless, according to the view expressed here, the payment of an advance on costs is a prerequisite for ordering the rent/leasehold freeze. This follows from the general rule of Art. 68 para. 1 SchKG: According to this, the debt collector must advance the debt collection costs; if it does not comply with this advance payment obligation, the debt collection office can temporarily refrain from taking the debt collection action. The debt enforcement costs include in particular the fees for the determination of tenancy and leasehold relationships (Art. 17 GebV SchKG; see N. 32) and for the administration of real estate (Art. 27 GebV SchKG; see N. 41).

## D. Procedure

31 After the enforcing lienor has submitted the request for extension and paid the required advance on costs (see above), various procedural steps follow:

(i) Determination of rental/lease agreements: The debt enforcement office determines "immediately upon receipt of the request for debt enforcement whether and which rental or lease agreements exist on the property" (Art. 91 para. 1 VZG). The debt enforcement office will question the debtor and/or the third-party lien holder; both are obliged to provide information about any rental/lease agreements, otherwise they are liable to prosecution (Art. 91 SchKG; Art. 323 f. SCC). If the debt enforcement office establishes that the pledged property is rented/leased (or a comparable situation exists; see N. 25), the proceedings continue. Otherwise, the following procedural steps are superfluous - the debt enforcement office cannot impose an interest freeze. 32

(ii) Notification to tenant/lessee (Art. 152 para. 2 SchKG and Art. 91 para. 1 VZG; form VZG No. 5, Art. 7 SchKK): The debt enforcement office then immediately informs the tenant/lessee of the increase in the debt enforcement proceedings. In the notification, it instructs the tenant/leaseholder - pointing out the risk of double payment - to pay the rent/leasehold interest due to the debt enforcement office (rent/leasehold interest freeze). Only with this notification does the interest freeze take effect for the tenant/leaseholder (Art. 806 para. 2 CC); after receiving the notification, the tenant/leaseholder can no longer make payments to the landlord/lessor (usually the lien holder) with discharging effect (see N. 39 and N. 48). The following should be added: 33

- The debt enforcement office is responsible for the notification; a purely private notification (e.g. by the mortgagee) has no blocking effect.
- In order for the debt enforcement office to be able to notify the tenant/lessee or order an interest freeze, the debt enforcement proceedings must first be initiated - by serving the payment order on the debtor (Art. 38 para. 2 SchKG). An order for payment served during the grace period (Art. 56 SchKG) only takes effect on the first day after the end of the grace period; it is therefore necessary to wait until the end of the grace period before the debt enforcement office can order the interest freeze. However, it is irrelevant for the ordering of the interest freeze whether this takes place during the debt enforcement vacations (Art. 56 para. 2 SchKG) or during a legal standstill granted to the debtor or lien holder (Art. 56 para. 3 SchKG) - as long as the debt enforcement office serves the payment order before the start of the debt enforcement vacations or the legal standstill, the debt enforcement office must pronounce the interest freeze (Art. 91 para. 2 VZG). This provision has been criticized by some scholars: as the interest freeze

requires prior service of the payment order, there can sometimes be considerable delays (debt enforcement vacations and legal standstill) before the interest freeze takes effect. For understandable reasons, this part of the doctrine therefore argues that an interest freeze should be ordered as soon as the application for debt enforcement is submitted; any grace periods would then have no influence on the interest freeze. In this way, the purpose of the interest freeze - the provisional securing of rent/lease interest - can be achieved in the best possible way.

- The attachment of a property includes in particular the current rent/leasehold interest (Art. 102 para. 1 SchKG; Art. 14 para. 1 VZG). For this reason, the debt enforcement office must also notify the tenant/leaseholder in the debt enforcement proceedings for attachment "that in future they can only legally pay the rent (lease) interest to the debt enforcement office" (Art. 15 para. 1 lit. b VZG; cf. Art. 102 para. 2 SchKG). In this case, no additional notification to the tenant/leaseholder is required in a subsequent debt enforcement for realization of the lien (Art. 91 para. 2 sentence 2 sub-sentence 1 VZG). The same applies if a new application for enforcement of a lien is made or the property is seized (Art. 91 para. 2 sentence 2 sub-sentence 2 VZG).

34 (iii) Notification of the lien holder (Art. 92 para. 1 VZG; Form VZG No. 6, Art. 8 SchKK): At the same time as the notification to the tenant/lessee (N. 33), the debt enforcement office informs the lien holder (debtor or third party owner) of the extension of the lien. The debt enforcement office informs the lien holder that he is prohibited from accepting interest payments or concluding legal transactions on them under penalty of prosecution (Art. 292 SCC).

35 (iv) Objection by the lien holder: The lien holder (debtor or third party owner) may lodge an objection with the debt enforcement office within ten days of service of the notice (Art. 92 para. 1 VZG; N. 34). With this objection, he can assert that the lien does not extend to the rent/leasehold interest or that it only extends to part of it (Art. 93 para. 2 VZG). The debt enforcement office must inform the lien holder separately of this possibility of objection in the notification (Art. 92 para. 2 VZG). The following must be observed when raising an objection:

- According to the wording of the law, the objection must be made "stating the reasons and [...] the disputed partial amounts" (Art. 92 para. 2, last sentence VZG). However, the debt enforcement office must not place too high demands on these reasons.

- The ten-day period is triggered by the notification within the meaning of Art. 92 para. 1 VZG. Since the notification must be made to the lien holder and the tenant/lessee at the same time (Art. 92 para. 1 sub-sentence 1 VZG), the debt enforcement office must - with a view to Art. 91 para. 1 VZG (see n. 33) - also make the notification during the closed period (Art. 56 SchKG). However, this does not answer the question of when the ten-day period begins to run if the notification is made during the closed period. According to the view expressed here, the notification to the lien holder - analogous to the service of the attachment document (Art. 274 SchKG) and in contrast to the notification to the tenant/leaseholder - is a debt enforcement act within the meaning of Art. 56 SchKG; accordingly, the notification only takes effect on the first day after the end of the grace period (event triggering the period). The time limit begins to run on the following day (Art. 31 SchKG in conjunction with Art. 142 para. 1 CPC). If the time limit ends during the grace period, Art. 63 SchKG (not Art. 145 CPC) applies. Compliance with the time limit is governed by Art. 143 CPC (in conjunction with Art. 31 SchKG).
- The objection within the meaning of Art. 92 para. 2 VZG must be distinguished from the legal objection to the lien. If the objections of the debtor relate to the scope of the lien (i.e. the extension of the lien to the rental/lease interest), the lien holder must raise the objection. If, on the other hand, the debtor wishes to dispute the existence, scope or due date of the claim or the existence of the lien, he must assert this with a legal objection (see Art. 85 VZG; see also N. 36). Whether the lien holder raises the objection and/or the objection has an influence on the subsequent proceedings: The debtor can remove the objection in the legal opening proceedings or in the ordinary proceedings (Art. 153a SchKG; Art. 93 para. 1 VZG), whereas the debtor creditor only has recourse to the ordinary proceedings if the objection is raised (Art. 93 para. 2 VZG; see also N. 36).
- If a third party asserts that it is entitled to the rent/leasehold interest, the objection procedure (Art. 106 et seq. CO) must be initiated (detailed N. 47); only the lien holder (debtor or third party owner) is entitled to the objection within the meaning of Art. 92 para. 2 VZG.

36 (v) Action for declaratory judgment by the enforcing pledgee: If the pledgee has raised the defense pursuant to Art. 92 para. 2 VZG, this is reported to the enforcing party (VZG form no. 8, Art. 13 and 14 SchKK). In this case, the debtor has the option of filing an action for declaratory judgment (action for determination of the disputed lien) within ten days of notification (Art. 93 para. 2 VZG). If it does not comply with this request, the debt enforcement office will lift the interest freeze (Art. 93 para. 3 and 4 VZG; see also Art. 153a para. 3 SchKG). This requires explanation:

- According to the view expressed here, the notification to the debt collector is not an act of debt enforcement within the meaning of Art. 56 SchKG, because the notification to the debt collector does not interfere with the legal position of the debtor. This means that the notification takes effect immediately, even during the grace period; the ten-day period begins to run on the day after the notification (Art. 142 para. 1 CPC in conjunction with Art. 31 SchKG). In the absence of an act of debt enforcement, Art. 63 SchKG does not apply either, but in my opinion the court vacations pursuant to Art. 145 CPC must be observed.
- If the debtor raises the objection within the meaning of Art. 92 para. 2 VZG and the legal proposal at the same time (see n. 35), the interest freeze is enforced as follows (see below the case law of the Federal Supreme Court, which is criticized by some scholars; see also VZG form no. 8): The debtor must decide between two courses of action within ten days of notification (Art. 153a para. 1 SchKG; Art. 93 para. 1 and 2 VZG). On the one hand, the debtor has the option of bringing an action for recognition (Art. 79 SchKG) and/or an action for declaratory judgment (Art. 93 para. 2 VZG; objective accumulation of claims within the meaning of Art. 90 CPC). On the other hand, the debtor has the option of initiating legal proceedings (Art. 80 et seq. SchKG). If the debtor chooses the second option, they can wait until the court has ruled on the legal opening before filing an action for declaratory judgment. If the court rejects the legal opening, the creditor must initiate an action for recognition within the meaning of Art. 79 SchKG and an action for declaratory judgment within the meaning of Art. 93 para. 2 VZG within ten days of the legally binding rejection (Art. 93 para. 1 VZG). If, on the other hand, the application to open legal proceedings is approved, the debt collector must bring an action for declaratory judgment pursuant to Art. 93 para. 2 VZG; the debt collection office sets a deadline of ten days

for this. Any action for revocation (Art. 83 para. 2 SchKG) has no influence on this deadline.

- If the debt collector misses one of the aforementioned deadlines, the debt enforcement office will revoke the interest freeze (Art. 93 para. 3 and 4 VZG; Art. 153a para. 3 SchKG). If the tenant/leaseholder has already paid rent/leasehold interest to the debt enforcement office in such cases, the interest will be paid to the interest creditor (Art. 93 para. 3 VZG). Irrespective of this, the debtor still has the option of eliminating the legal proposal and/or the objection within the two-year enforcement period (Art. 154 para. 1 SchKG).

(vi) If the debtor succeeds in eliminating the legal proposal (or if there is no le- 37
gal proposal), it can apply for the realization of the pledged property (Art. 154 para. 1 SchKG). The following must be observed:

- If the debt collector does not submit the request for realization within the statutory period of two years, the debt enforcement expires (Art. 154 para. 2 SchKG); the debt enforcement office lifts the interest freeze. In such a case, the debt enforcement office pays the interest received to the interest creditor (landlord/lessor) - at least according to some doctrine. In my opinion, an allocation of the interest received to the enforcing pledgee - as demanded by part of the doctrine - is only permissible if this interest is sufficient to settle the debt enforcement claim and costs and therefore a realization of the pledged property does not appear necessary (cf. hereafter 3rd lemma).
- The timely filing of the application for realization generally leads to the public forced sale of the property (Art. 156 in conjunction with 133 et seq. SchKG). When the property is knocked down to the successful bidder (see Art. 126 in conjunction with Art. 156 and 142a SchKG) - i.e. when the realization of the lien is completed - the lien expires in accordance with Art. 806 CC. Up to this point in time, the rent/lease interest accrued is due to the lienor enforcing the lien - thereafter to the successful bidder (see n. 26).
- However, in order for the enforcing mortgagee to be able to obtain satisfaction from the accrued rent/leasehold interest, the pledged property does not necessarily have to be realized: If the rent/leasehold interest received by the debt enforcement office (and/or other income) is sufficient to

cover the debt enforcement claims and costs, there is no need to realize the pledged property; it goes without saying that in this case there is no need to file a request for realization. This can also be combined with payments on account within the meaning of Art. 95 VZG (see n. 42 et seq., in particular n. 44).

- If the property cannot be realized due to insufficient bids (loss of lien pursuant to Art. 158 SchKG), the lienor shall nevertheless receive the rent/leasehold interest received by the debt enforcement office (Art. 111 para. 2 VZG). If the bid is accepted but the proceeds do not fully cover the claim, the same applies.

## E. Legal consequences

38 The rent/leasehold freeze has various consequences. On the one hand, the tenant/leaseholder must pay the interest to the debt enforcement office (Art. 806 para. 2 CC); at the same time, the debt enforcement office prohibits the lien holder from accepting any interest payments (Art. 92 para. 1 VZG). On the other hand, the administrative powers over the pledged property are (partially) transferred to the debt enforcement office. In detail:

39 (i) Tenant/leaseholder: as soon as the debt enforcement office has notified the tenant/leaseholder of the increase in the debt enforcement (N. 33), the latter can no longer make payments with discharging effect to the interest creditor, but only to the debt enforcement office (Art. 806 para. 2 CC; Art. 91 para. 1 VZG). Consequently, the interest debtor exposes himself to the risk of double payment if he continues to pay the interest to the interest creditor (see Art. 91 para. 1 VZG; see also N. 48). Notices of termination and complaints must henceforth be addressed to the debt enforcement office (VZG form no. 5), as the latter has administrative powers (see n. 41).

40 (ii) Lien holder: Once the interest freeze has been issued, the lien holder is prohibited from accepting rent/lease payments or concluding legal transactions in this regard under penalty of prosecution (Art. 292 SCC) (Art. 92 para. 1 VZG). If the tenant/leaseholder nevertheless transfers the interest to the lien holder (e.g. due to an unadjusted standing order), the lien holder must immediately hand over the amount to the debt enforcement office, otherwise he could be liable to prosecution. Furthermore, the interest freeze has the consequence that the administrative powers of the lien holder over the property

are restricted (see below); in particular - after the interest freeze has been issued - the right to terminate and expel the property falls within the exclusive remit of the debt enforcement office.

(iii) Administration of the pledged property: Once the interest freeze has been issued, the debt enforcement office - in place of the debtor or pledgee - must take all measures necessary to secure and collect the rent/leasehold interest (Art. 94 para. 1 VZG). It is permissible to transfer these administrative powers to a third party (Art. 94 para. 2 VZG). This needs to be supplemented in several respects: 41

- Art. 94 para. 1 VZG contains a non-exhaustive list ("measures [...] such as") of administrative measures that fall within the remit of the debt enforcement office (or the appointed third party) once the interest freeze has been ordered. However, the administrative powers are limited: in principle, they only include urgent security measures. The debt enforcement office (or the appointed third party) only has comprehensive administrative powers from the time the application for realization is filed (Art. 154 SchKG) (Art. 101 VZG; see also Art. 17 f. VZG).
- The debt enforcement office may transfer the administrative powers to a third party that appears most suitable for this purpose (e.g. real estate management; Art. 94 para. 2 VZG). Transfer to the debtor being pursued is also permitted. The Federal Supreme Court classifies the transfer of administrative powers as a mandate or sui generis contract; Art. 394 et seq. of the CO apply in both cases. The relationship between the debt enforcement office and third parties is of a public law nature.
- If the debt enforcement office (or the commissioned third party) exceeds its powers under Art. 94 VZG, the corresponding administrative act can be challenged with an appeal under Art. 17 SchKG. Any liability is governed by Art. 5 SchKG and not by civil law.
- In order for the debt enforcement office to make use of its administrative powers, the pledged property must be rented/leased or otherwise covered by the scope of application of Art. 152 para. 2 SchKG (N. 25).
- The debtor must submit the request for realization within the statutory period, otherwise the debt enforcement will lapse (Art. 154 para. 2 SchKG). The administrative powers of the debt enforcement office (or the commissioned third party) lapse when the debt enforcement proceedings expire.

## F. Individual questions

### 1. Payment on account

42 First and foremost, the rental/leasehold income must be used to cover administrative expenses and administrative costs as well as any maintenance contributions to the debtor and his family (Art. 103 para. 2 SchKG) (Art. 94 para. 1 VZG). In addition, the enforcing mortgagee can demand that the debt enforcement office makes so-called interim payments from the rent/leasehold interest received - even before the application for realization is filed. However, the debt collector must be able to prove that the debt enforcement claim has been recognized or legally established (Art. 95 para. 1 VZG). Any legal proposals and defenses within the meaning of Art. 92 para. 2 VZG must be removed by the debt collector before payment is made (for the procedure, see N. 36). Two things must be made clear:

- Non-enforcing mortgagees are not entitled to interim payments (see Art. 95 para. 1 VZG).
- A payment on account is excluded if the debt collector is unable to prove that the debtor has a recognized or legally established claim; the debt enforcement office has no discretionary power. The debtor's consent (alone) to the payment on account is not sufficient. The case is different if the debtor recognizes the claim in the amount of the rent/lease interest received; according to Art. 95 para. 2 VZG, recognition entitles the debtor to make an interim payment.

43 If there are several mortgagees (concerning the same property), an interim payment is only permissible in two cases: It requires either the consent of all claimants or the establishment of a schedule of claims pursuant to Art. 157 para. 3 SchKG and the prior imposition of the list of liens (Art. 95 para. 2 VZG).

44 In the case of smaller claims, the interim payment enables the mortgagee to be satisfied without having to realize the property. During the two-year liquidation period (Art. 154 para. 2 VZG), the mortgagee can allow the interest freeze to continue without making a request for liquidation; during this time, the mortgagee's claim is gradually repaid by the payments on account (cf. n. 37 for the whole).

If the lienor is declared bankrupt, Art. 96 VZG must be observed. 45

## 2. Multiple lienors

If several lienors file a debt enforcement request with an application for an extension of the lien, the preferential right with regard to the rent/leasehold interest claims is based on the respective ranking of their liens (Art. 114 para. 2 VZG; see Art. 813 et seq. CC). This only applies without restriction after the application for realization has been filed - before that, the legal situation is different: in this case, the decisive factor is whether the respective mortgagee has applied for the extension of the lien (see Art. 114 para. 1 VZG and Art. 806 CC). Specifically, this means the following: Primarily, the first mortgagee is entitled to the rent/lease interest that has fallen due - until such time as a mortgagee with a higher ranking requests the extension of the lien. From then on, the newly due rent/leasehold interest shall accrue to the senior mortgagee as long as no other mortgagee with an (even) better ranking requests the extension of the lien. 46

## 3. Disputes about the entitlement to the rent/lease claims

The lienor (debtor or third-party lienor) can use the defense under Art. 92 para. 2 VZG to argue that the lien does not extend at all or only to part of the rent/leasehold interest (see N. 35). The tenant/leaseholder and other third parties are not entitled to this defense. However, they have recourse to the objection procedure (Art. 106 et seq. SchKG) if they do not agree with the extension of the lien to the rent/lease payments. Disputes about the entitlement to interest claims may arise, particularly in connection with Art. 806 para. 3 CC. The following should be added: 47

- If the tenant/leaseholder (or another third party claimant) disputes that the lien extends to the rent/leasehold interest, the debt enforcement office must initiate an objection procedure. The debt enforcement office then decides, at its discretion, who is to decide whether the alleged claims are better justified; depending on this, it sets a deadline for the tenant/leaseholder (or another third party claimant), the mortgagee, the owner of the property or the debtor to file an objection.
- Contrary to some doctrine, the dispute over the rent/leasehold claims must be dealt with in the objection proceedings even if the mortgagee has filed the application for realization (see Art. 106 para. 2 SchKG).

- As long as the competent court has not made a decision in the objection proceedings, the interest freeze continues (see Art. 93 para. 3 and 4 VZG). The interest debtor is therefore still required to make payment to the debt enforcement office, otherwise he risks having to pay the interest a second time.

### 4. Double payment case

48 If the interest debtor (tenant/lessor) continues to pay the interest to the interest creditor (landlord/lessor) despite the interest freeze, there is a risk that the interest debtor will have to make a further payment to the debt enforcement office (see N. 39). If this double payment occurs, the question arises as to whether the interest debtor has a repayment claim against the interest creditor. According to the view expressed here, this must be affirmed: the interest debtor has a claim under the law of enrichment against the interest creditor (Art. 62 et seq. CO). However, it should be noted that the interest debtor bears the collection risk due to the double payment and may not be able to enforce its claim for enrichment against the interest creditor.

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COMMENTARY ON

# Art. 222 DEBA

A commentary by Selim Marasco-Keller

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**B. Duty to provide information on and hand over assets**

**Art. 222**

[1] The debtor is obliged, subject to criminal penalties for failing to do so, to declare and hand over all his assets to the bankruptcy office (Arts 163 para. 1 and 323 para. 4 SCC).

[2] If the debtor has died or has absconded, all adult persons who lived in the same household as the debtor are subject to the same obligations, subject to criminal penalties for failing to do so (Art. 324 para. 1 SCC).

[3] The persons obliged under paragraphs 1 and 2 must open the premises and containers to the official on request. The official may use police powers if necessary.

4 Third parties who hold the debtor's assets in safekeeping or with whom the debtor has assets are obliged to provide information on and hand over the assets to the same extent as the debtor, subject to criminal penalties for failing to do so (Art. 324 para. 5 SCC).

5 Public authorities are obliged to provide information to the same extent as the debtor.

6 The bankruptcy office shall expressly draw the attention of the persons concerned to their obligations and to the criminal penalties for failing to comply.

# CONTENT

# I. PRELIMINARY REMARKS

1 Art. 222 DEBA regulates the obligation to provide information and surrender assets in bankruptcy. The purpose of this provision is to ensure that **the bankruptcy estate** is recorded comprehensively and completely so that creditors can be satisfied equally. The duty to provide information and surrender assets is, alongside the duty to attend (Art. 229 DEBA) and the duty to verify claims (Art. 244 DEBA), the only positive obligation of the debtor in bankruptcy proceedings.

2 Both the debtor and third parties must be made aware of the criminal consequences of violating the duty to provide information (Art. 222 para. 6 DEBA). The threat of criminal consequences is an objective condition for criminal liability.

# II. OBLIGATIONS OF THE DEBTOR

## A. Duty to provide information and surrender assets (Art. 222 para. 1 and 2 DEBA)

### 1. Principle and personal scope of application

3 According to Art. 222 para. 1 DEBA, the debtor is obliged, under penalty of law, to disclose all his assets to the bankruptcy office and to make them available.

4 From a **personal perspective**, the debtor is subject to the duty to provide information and surrender assets. With regard to the important practical application of companies in bankruptcy, the following applies:

- **Stock corporation, limited liability company, and cooperative**: The organs of the company are subject to the duty to provide information and surrender assets (cf. Art. 30 para. 1 KOV). Any auditors are also covered.
- **General partnerships and limited partnerships**: The partners with unlimited liability who are present and authorized to manage the business are subject to the duty to provide information and surrender assets (see Art. 30 para. 1 KOV).

- **Association**: The members of the executive board are required to provide information and hand over documents.
- **Foundation**: The members of its organs (i.e., in particular the foundation board) are required to provide information and hand over documents.

Organs that have resigned or been dissolved remain obliged to provide information for transactions up to the time of their resignation or dissolution. De facto organs are also covered. 5

The bankruptcy office may question other employees who do not hold a position in a governing body, at least as long as the bankruptcy office proceeds informally (i.e., without the threat of punishment). 6

If the debtor has died or fled, these obligations fall to his adult household members (Art. 222 para. 2 DEBA). 7

## 2. Subject matter of the obligation to provide information and surrender property

The content of the joint debtor's obligation to provide information and surrender property corresponds to the debtor's obligation in attachment proceedings (Art. 91 DEBA; cf. (OK-Marasco-Keller, Art. 91 DEBA N. 10 ff.). In practical terms, this is a **comprehensive duty to provide information and surrender assets** with regard to assets of all kinds. It applies not only to the actual assets, but also to all documents necessary to make the relevant assets available. The duty to provide information extends to all information that is suitable for determining the existence, scope, and, where applicable, the location of the assets. 8

In **terms of time**, the bankruptcy office may request information relating to transactions that took place within the period of suspicion for Paulian avoidance actions (i.e., **up to five years ago**). This case law established for attachment proceedings (see OK-Marasco-Keller, Art. 91 DEBA N. 16) also applies in bankruptcy. The bankruptcy office therefore does not have to demonstrate any particular urgency or prove any suspicion of potentially contestable transactions for information relating to the five-year period of suspicion. 9

The debtor must also provide information (under threat of punishment) about assets located abroad. However, the debtor cannot be forced under threat of punishment to make assets located abroad available to the bankruptcy estate. 10

11 A further specification of the duty to provide information can be found in Art. 37 KOV, which defines (non-exhaustively) the subject matter of the interrogation by the bankruptcy office. According to this provision, the bankruptcy office must question the debtor in particular about his known creditors, ongoing legal proceedings, existing insurance contracts, any financial claims of children, and his military status.

12 The debtor is not entitled to refuse to provide information on the grounds of alleged exemption from seizure. Information must therefore also be provided about alleged items of competence and assets to which third parties assert claims.

13 Nor can the debtor invoke professional or business secrecy to refuse to provide information.

### B. Obligation to open premises and containers (Art. 222 para. 3 DEBA)

14 The debtor must open premises and containers to the bankruptcy official upon request. If necessary, the bankruptcy official may call on the police to enforce this (Art. 222 para. 3 DEBA). Police force may generally be used immediately (i.e., without further court order) (OK-Marasco-Keller, Art. 91 DEBA N. 22 ff.). The bankruptcy office decides on the use of police force, but must observe the principle of proportionality.

## III. OBLIGATIONS OF THIRD PARTIES, IN PARTICULAR BANKS (ART. 222 PARA. 4 DEBA)

### 1. Principle and scope of application

15 Third parties who hold the debtor's assets or with whom the debtor has credit balances are subject to the same obligations to provide information and surrender assets as the debtor himself (Art. 222 para. 4 DEBA).

16 The term “third party” is to be understood broadly and includes, in particular, **professionals bound by professional secrecy**. Banking or attorney-client privilege does not entitle them to refuse to provide information about the debtor's assets (OK-Marasco-Keller, Art. 91 DEBA N. 25).

The term "credit balance" is also to be understood broadly. It includes not only traditional "bank assets," but also all claims of the debtor against third parties. For example, it also includes claims assigned under Art. 260 DEBA, since in this case the assignee has an asset that remains the property of the bankruptcy estate. 17

### 2. Requirements for the obligation to provide information

In order for the bankruptcy office to be able to oblige a third party to provide information, it must have a **suspicion** that the third party actually has assets at its disposal. Unlike in the case of attachment, however, bankruptcy is made public and, with the announcement, all third-party debtors are requested (under threat of penalty) to report to the bankruptcy office (Art. 232 para. 2 DEBA). 18

It is controversial whether banks must provide information to the bankruptcy authorities on their own initiative (and thus systematically) after the bankruptcy has been published. Since Art. 232 para. 2 DEBA takes precedence over banking secrecy, there is no reason, in the opinion represented here, to give banks preferential treatment compared to other third-party debtors. In practice, bankruptcy offices usually inform banks of the opening of bankruptcy proceedings by means of specific requests for information, which is why this is primarily a theoretical problem. 19

If a third party is obliged to provide information, this obligation corresponds in content to that of the debtor (Art. 222 para. 4 DEBA). This includes all information that allows conclusions to be drawn about the debtor's financial situation. 20

A third-party debtor must disclose to the bankruptcy office all documents and information that it would have to disclose to the debtor itself on the basis of its relationship with the debtor (e.g. in accordance with Art. 400 CO). 21

Based on Art. 222 DEBA, the bankruptcy office may also request information from an assignee regarding claims assigned pursuant to Art. 260 DEBA. 22

## IV. DUTY OF DISCLOSURE BY AUTHORITIES

Authorities are subject to the same duty of disclosure as the debtor (Art. 222 para. 4 DEBA). The duty to provide information under bankruptcy law takes 23 precedence over official secrecy. This applies to **all authorities**. It is irrelevant whether the authority is federal, cantonal, or municipal, or in which area the authority is active (see OK-Marasco-Keller, Art. 91 DEBA N. 32 ff.).

24 The duty of authorities to provide information only applies insofar as it relates to information that is essential to the bankruptcy proceedings. Any further requests to authorities are inadmissible.

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COMMENTARY ON

# Art. 260 DEBA

A commentary by Dominik Milani / Jonas Stähli

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**F. Assignment of rights**

**Art. 260**

[1] If the community of creditors waives its right to assert a claim, any one of the creditors may individually request that the estate's rights be assigned to him.

[2] After deduction of the costs, the result shall serve to cover the claims of those creditors to which the claim was assigned, in accordance with their respective ranks. The surplus must be paid into the estate.

[3] If the community of creditors waives its right to assert its claims and no creditor demands assignment, such claims may be realised in accordance with Article 256.

# CONTENT

# I. GENERAL PROVISIONS

## A. Purpose

Pursuant to Art. 240 of DEBA, the bankruptcy administration must carry out all transactions necessary for the preservation and **realization of the estate** and, pursuant to Art. 243 para. 1 DEBA, collect undisputed, due claims of the estate or the debtor. 1

Art. 260 DEBA establishes the **method of realization** for all those items of the bankruptcy estate that are not (or cannot be) primarily converted into cash through a private sale (Art. 256 DEBA) or an auction (Art. 257 et seq. DEBA). Furthermore, Paulian avoidance claims are, by law, excluded from both private sales (Art. 256 DEBA) and auctions (Art. 257 et seq. DEBA) (Art. 256 para. 4 DEBA); the enforcement of Paulian avoidance claims is therefore only possible in accordance with Art. 260 DEBA (see also, in particular, para. 1 of Art. 10 of the VPAV). 2

## B. Legal Nature

Legal doctrine and case law characterize the legal nature of the assignment under Art. 260 para. 1 DEBA as a **sui generis institution under debt enforcement and procedural law**. The legal nature of the assignment is likened to that of assignment, agency law, and litigation representation: The two elements that assignment and the assignment under Art. 260 DEBA have in common are, on the one hand, the conduct of a lawsuit in one's own name, at one's own expense and risk. On the other hand, the right to sue is accessory as a secondary right to the bankruptcy claim within the meaning of Art. 170 CO. It passes to the assignee upon assignment of the bankruptcy claim. With regard to the law of agency, the Federal Supreme Court has on various occasions likened assignment to a debt collection mandate. Ultimately, the Federal Supreme Court characterizes assignment as an institution that can be described as litigation representation. Litigation representation grants the representative the right to assert the legal claim of the substantive rights holder in their own name. 3

# II. REQUIREMENTS FOR ASSIGNMENT

## A. Ongoing Bankruptcy Proceedings

4 The assignment takes place **during ongoing** (ordinary or summary) **bankruptcy proceedings**. The bankruptcy must therefore not have been revoked, suspended, or concluded at the time of the assignment.

5 **After the conclusion of the bankruptcy**, however, newly discovered, doubtful claims are brought to the attention of the bankruptcy creditors in accordance with Art. 269 para. 3 DEBA, whereupon the procedure under Art. 260 DEBA applies; without, however, the entity deleted from the Commercial Register (Art. 935 CO; Art. 159a para. 1 lit. b CRO) would have to be re-registered.

## B. Assignable Legal Claims

6 Para. 260(1) DEBA provides that legal claims may be assigned to creditors of the bankrupt debtor. This includes **claims on assets and liabilities** (i.e., powers to increase and preserve the estate) alike.

7 **Claims for the increase of the estate** include, for example, claims in rem or contractual claims to which the estate is entitled. As a rule, these are disputed claims, such as claims for rescission under the Act of Paul or liability claims against corporate bodies (Art. 754 et seq. CO).

8 **Claims for the preservation of the estate** include, in particular, the contestation of a claim for separation, claims against the debtor that were already pending at the time of the opening of bankruptcy proceedings, or doubtful estate liabilities (e.g., the trustee's fees).

## C. Creditor Status

9 By law, the right of assignment is available only to those **creditors** who have been **admitted to the list of claims** or whose claim has not been definitively dismissed. If the admission of a bankruptcy creditor to the list of claims is not yet final, the assignment is subject to a resolutive condition. Upon the final dismissal of the admission to the list of claims, the assignment lapses *eo ipso*.

10 According to Federal Supreme Court case law and prevailing doctrine, so-called **chain assignment** is **permissible**. Such a situation arises when an as-

signee creditor himself goes into bankruptcy and the right to sue against the third-party debtor to which he is entitled is assigned to his bankruptcy creditors.

The **assignment to the third-party debtor** or the purported obligor against whom the assigned claim is directed (or to a person closely related to him) is **void**. 11

## D. Waiver Resolution by the Body of Creditors

The waiver resolution, which takes effect within the bankruptcy proceedings, must be adopted with the **involvement of all bankruptcy creditors**, whereby silence on the part of the bankruptcy creditors regarding the motion for the resolution is deemed consent. 12

In **ordinary bankruptcy proceedings**, the waiver resolution is generally adopted at the second creditors' meeting; in rare cases, the waiver resolution may also be adopted at the first meeting, at a special creditors' meeting, or by circular resolution. 13

In **summary bankruptcy proceedings**, the waiver resolution is generally adopted by circular resolution, as creditors' meetings are not usually provided for or are convened only under special circumstances (para. 231(3)(1) DEBA). 14

## E. Assignment Request by at Least One Bankruptcy Creditor

The request for assignment may be filed by any bankruptcy creditor within the **time limit** set by the bankruptcy administration. 15

In **ordinary bankruptcy proceedings**, the minimum time limit is **10 days**. 16

For **summary bankruptcy proceedings**, the bankruptcy administration **generally sets a time limit of 10–20 days** following service of the circular letter. 17

# III. ASSIGNMENT AND ITS CONSEQUENCES

## A. Mandatory Use of Form

The assignment is effected by a formal order using **Form 7k** (Art. 80 KOV), which must contain the following mandatory information: 18

“1. The assignment of the right to sue to a third party is only permissible in conjunction with an admitted bankruptcy claim.

2. The bankruptcy administration must be promptly notified of the outcome of the assertion of the rights in question, whether judicial or extrajudicial, with supporting documents attached.

3. If the steps taken to assert the rights are wholly or partially successful, the proceeds, insofar as they consist of cash, may be retained after deduction of costs to cover the aforementioned claim; any surplus must be remitted to the estate. If the proceeds do not consist of cash, they must be handed over to the bankruptcy administration for realization.

4. Receipts for the costs incurred must be submitted to the bankruptcy administration. Any awarded litigation costs against the opposing party must either be deducted or assigned to the bankruptcy administration for collection.

5. If multiple assignments regarding the same estate rights have been made to different creditors, they must appear as intervenors in any legal proceedings, and the shares of the proceeds attributable to each will be determined by the bankruptcy administration in a distribution list to be prepared following receipt of the report on the outcome of the assertion of claims.

6. The bankruptcy administration reserves the right to annul the assignment if a claim is not asserted in court within a period to be set by it.

7. The creditors concerned are liable for any disadvantage incurred by the estate as a result of negligent litigation.”

19 These requirements therefore constitute the **minimum content** that the assignment order must contain. It is also required that the assignment creditors be named by name or business name in the assignment order; at the same time, the amount of the bankruptcy claim is to be recorded in CHF (Art. 211 para. 1 DEBA applies analogously to foreign currency claims), provided this amount has already been determined; otherwise, a pro memoria note is made (see Art. 63 para. 1 KOV). This information is necessary so that the respective assignee can identify themselves accordingly, whether vis-à-vis the obligor and/or the respective authority.

In addition, in our view, it is permissible to include **additional conditions** in Form 7k (e.g., if there are multiple assignees, certain coordination aspects may be listed). 20

By analogy with Art. 129 CPC, the assignment order is drafted in the **official language of the place of bankruptcy**. 21

## B. Duration of the Assignment

The bankruptcy administration sets a **deadline for judicial enforcement** for the assignee(s) (no. 6 of Form 7k). 22

This deadline is a **procedural deadline** intended to ensure prompt action by the assignees. The deadline may be extended. The expiration of the procedural deadline does not automatically result in the lapse of the assignment order. Rather, this requires formal revocation by the bankruptcy administration. 23

The deadlines set forth in Art. 33(1) BIV-FINMA (**bankruptcy of banks**) and Art. 32(1) VKV-FINMA (**insurance bankruptcy**) are structured not as procedural deadlines but as **forfeiture deadlines**. 24

## C. Assignment to Multiple Assignment Creditors in Particular

The assignment order **grants** each assignee the **right to sue** regarding the claim against the third-party debtor to which the bankrupt debtor is entitled. 25

In the context of the plaintiff's enforcement of the claim, the assignees constitute so-called **non-proper necessary co-plaintiffs**. As with necessary joinder, the assignees must seek a uniform judgment. 26

According to Federal Supreme Court case law and prevailing doctrine, each assignee is entitled to a **right to bring an individual action** based on the granted right to sue. Against this background, it is conceivable that an assignee might initiate an action without the others. In our view, neither a court nor the bankruptcy administration can compel the other assignees to participate in an individual action. 27

Courts review the **composition of the co-litigants** using Form 7k, which lists the names of all assignees as of the date of the order. 28

29 If it turns out that only one or a portion of the assignees is proceeding with the lawsuit, the courts must issue a decision to dismiss the case for lack of **standing to sue**, which is examined as a **prerequisite for the lawsuit**.

30 A **decision to dismiss the case** can be avoided, in particular, if the assigned creditors not involved in the proceedings waive their standing to sue, join the proceedings as intervenors, or assign their bankruptcy claims to the assigned creditor bringing the individual action.

31 The initiation of **parallel proceedings** with consolidation is also conceivable. In our view, the bankruptcy administration cannot compel the remaining assignees to exercise any of the aforementioned coordination options. For this reason, the only effective means of enforcing claims is, in principle, the joint initiation of legal action by the assignees. If the assignees cannot agree on the elements necessary for initiating the action, such as territorial or subject-matter jurisdiction or the timing of the action, the bankruptcy administration must issue authoritative guidelines. The bankruptcy administration revokes the assignment order for assignees who act contrary to the guidelines.

32 The Federal Supreme Court and prevailing doctrine permit the assignees to **conduct the proceedings inconsistently**. The rationale is the differing interests of the assignees regarding the distribution of proceeds. For courts, this means that they may be confronted with multiple submissions from the assignees. Courts must resolve contradictions regarding factual allegations or motions for evidence through their judicial assessment of the evidence.

33 Another distinctive feature of non-genuine necessary joinder is that assignees have a **right to withdraw from the proceedings at any time** without the proceedings ending for the other parties to the action.

34 For **further details** regarding the preceding elements of non-genuine necessary joinder under Art. 260 DEBA and regarding further specific issues, such as the effect of an individual lawsuit or individual debt enforcement proceeding on the interruption of the statute of limitations, the modalities of a genuine or separate settlement with the third-party debtor, the joinder of an assignee-creditor with a subsequent assignment order within the meaning of Art. 251 DEBA, the assignment of the bankruptcy claim and its effect on the joint litigation, and the allocation of litigation costs, reference is made to **Stähli**.

## D. (Partial) Revocation of the Assignment

Pursuant to No. 6 of Form 7k, the bankruptcy administration may revoke the assignment against an assignee after setting a deadline for the judicial assertion of the **claim**. This authority ensures that assignees do not delay the enforcement of the claim. If there is disagreement among assignment creditors as to how the claim should be enforced, the bankruptcy administration may issue **instructions** to the assignment creditors. If some of the assignment creditors refuse to comply with the instructions, the bankruptcy administration may revoke their assignment after the deadline has expired. 35

The legal effect of the revocation—namely, the **loss of the right to sue** by the assignee creditors affected by the revocation order—does not take effect upon the expiration of the deadline, but only upon the issuance of the revocation order. The issuance of the revocation order after the deadline has expired is at the discretion of the bankruptcy administration. 36

## E. Liability of Assignment Creditors

Form 7k provides in no. 7 that assignment creditors are liable to the estate for losses arising from negligent litigation by the assignment creditors. Form 7k does not further define what exactly is meant by "negligent litigation." The Federal Supreme Court has held in this regard that assignees are not liable if they do not assert the debtor's full claim against the third-party debtor. Assignees are free to enforce even only a **portion of the claim** in the form of a partial action or through a settlement. 37

**Liability to the estate**, on the other hand, is conceivable if an assignee, through his actions, places the estate in a situation that is less favorable than it would have been had no assignment taken place. An example of this is an assignee who has the claim assigned to him and subsequently fails to interrupt the statute of limitations. 38

# IV. DISTRIBUTION OF THE PROCEEDS OF THE LAWSUIT (PARA. 2)

**Entitled to proceeds** are assignees who have participated in the enforcement of the plaintiff's claim, i.e., who have not withdrawn from the proceedings prior to the pronouncement of the judgment. The proceeds constitute 39 "the premium for the effort expended to achieve the outcome of the proceedings and, in particular, for assuming the risk of having to bear the litigation costs."

40 To calculate the proceeds to be distributed among the assignees, the costs incurred in the context of the claim and which are deductible are first deducted from the generated proceeds. The proceeds are distributed in accordance with the system set forth in **Art. 219 DEBA**. Assignment creditors whose bankruptcy claims have been collated in a preceding class are satisfied first. Within the same class, the allocation is made according to the value ratio of the collated claims. If there are multiple assignment creditors, the bankruptcy administration prepares a special distribution list by class and amount of the respective bankruptcy claims (Art. 86 KOV).

41 If there is a **surplus** exceeding the collated claims of the assignee creditors, this surplus accrues to the estate. In practice, such a surplus is extremely rare, as an assignee creditor will typically limit the amount of the claim to the amount of their collated claim in order to reduce the risk of litigation costs.

## V. POSSIBILITY OF REALIZATION UNDER ART. 256 DEBA (PARA. 3)

42 Art. 260 para. 3 DEBA provides that, in the event that all creditors waive the assertion of the claims to be assigned and do not demand an assignment, the claims may be realized pursuant to **Art. 256 DEBA**. This means that such claims may be realized through auction or private sale.

43 This is intended to allow the bankruptcy administration, as a **last resort**, to attempt to realize even these illiquid claims—for which no assignee could be found. However, claims for avoidance under the Act of 1864 are not subject to realization under Art. 256 DEBA (Art. 256 para. 4 DEBA); they consequently lapse and must be written off in the bankruptcy inventory.

44 Unlike in the case of assignment under Art. 260 DEBA and Art. 80 KOV, a realization pursuant to Art. 256 DEBA results in the **illiquid claim being removed from the estate**; therefore, both the award in a forced sale (Art. 258 DEBA) and any private sale (Art. 256 DEBA), as acts of public authority, result in the acquisition of the illiquid claim. Consequently, Art. 260 para. 2 DEBA also does not apply. Any positive outcome of the proceedings is always due

solely to the acquirer. Consequently, the acquirer is under no obligation to surrender any surplus that may be realized.

However, the bankruptcy administration is not required to always attempt to realize illiquid, non-assigned claims pursuant to Art. 260(3) in conjunction with Art. 256 DEBA, as is evident from the discretionary wording in para. 3 of Art. 260 DEBA. In our view, it is rather within the **discretion of the bankruptcy administration** to decide whether realization pursuant to Art. 260 para. 3 in conjunction with Art. 256 DEBA is even an option. 45

However, if the illiquid claim cannot be realized even through a forced sale and/or private sale, it **falls out of the bankruptcy estate**. With reference to Lorandi, this means nothing other than that the bankrupt regains the power of disposal under Art. 204 DEBA partially and solely with respect to the relevant claim. The debtor regains the power of disposal *eo ipso* by virtue of the fact that a realization within the meaning of Art. 260 para. 3 in conjunction with Art. 256 DEBA cannot or could not take place. 46

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COMMENTARY ON

# Art. 265 DEBA

A commentary by Arnaud Constantin

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**E. Unpaid debt certificate**

**1. Content and effects**

**Art. 265**

[1] During distribution, each creditor shall receive an unpaid debt certificate for the amount of his claim that remains uncovered. The certificate shall state whether the claim has been accepted or contested by the debtor. In the former case, the unpaid debt certificate is deemed to be an acknowledgement of debt within the meaning of Article 82.

[2] The unpaid debt certificate entitles the holder to carry out an attachment and has the legal effects specified in Articles 149 paragraph 4 and 149*a*. However, new debt enforcement proceedings may only be initiated on the basis of the certificate if the debtor has acquired new

assets. New assets also include assets over which the debtor has economic control.

[3] …

# CONTENT

# I. CERTIFICATE OF INSOLVENCY AFTER BANKRUPTCY

## A. Concept

1 The certificate of insolvency after bankruptcy is a **certificate** bearing the seal of public authority within the meaning of Art. 8 para. 2 LP, issued at the end of bankruptcy proceedings by the bankruptcy administration to each creditor who has not been fully repaid at the end of ordinary bankruptcy proceedings (Art. 221 ff. LP) or summary proceedings (Art. 231 LP; see N. 5 in the event of suspension of bankruptcy due to lack of assets). It specifies and certifies the amount of each definitively lodged claim that is not covered by the proceeds of liquidation, including collection costs and interest accrued up to the date of the opening of bankruptcy proceedings (Art. 209 LP). It allows creditors who have suffered a loss to bring new proceedings against the bankrupt debtor in order to obtain the balance of their claims (see N. 17; N. 22 ff. for the condition of a return to better fortune in order to continue such proceedings).

2 The **right to obtain** a certificate of insolvency after bankruptcy belongs to any creditor of a natural or legal person who has filed their claim within the filing period during the call to creditors (Art. 232 para. 2 no. 2 LP) and whose claim has not been definitively rejected. Privileged creditors have a corresponding right, in particular maintenance creditors who, although ranked in the first class according to Art. 219 para. 4 let. c LP, have not been paid in full. This right also exists for pledgees; a certificate of insufficient collateral pursuant to Art. 158 LP is not issued at the end of the bankruptcy proceedings for this category of creditors (see Art. 219 para. 1 LP for the preferential right of pledgees to the proceeds of realization; cf. Art. 89 para. 2 ORFI for the enforcement of a pledge against the third-party owner in the event of the disappearance of the legal entity following bankruptcy). The creditor of a deceased or absent debtor is also entitled to the issuance of a certificate of insolvency. Where applicable, the death or absence must be expressly mentioned in the certificate. Creditors whose claim is subject to a condition precedent or whose maturity date is uncertain within the meaning of Art. 264 para. 3 LP shall only receive a certificate of insolvency when their claim arises. As bankruptcy has the effect of making the bankrupt party's debts that are not yet due and payable become due and payable (Art. 208 para. 1 LP), an “ordinary” cer-

tificate of insolvency will be issued for claims that were not yet due and payable before the commencement of bankruptcy proceedings.

The issuance of the certificate of insolvency is concurrent with the distribution of any dividends to creditors (see Art. 266 LP for the distribution of provisional dividends). It takes place **automatically**, without the need for a request from the creditors, as soon as the amount of the loss has been established and the bankruptcy administration has ensured that no appeal has been lodged against the distribution table (Art. 88 OAOF) . It may be issued in electronic format. A complaint may be lodged within the meaning of Art. 17 LP if the office refuses, delays or fails to issue the certificate of insolvency. The costs of drawing up and issuing the certificate are included in the bankruptcy liquidation costs (Art. 262 para. 1 LP). In the event of loss, the office shall issue a duplicate upon reasoned request by the creditor. 3

Statistics on the number of bankruptcy proceedings opened in Switzerland and in each canton are available on the website of the Federal Statistical Office. In Switzerland, 1,425 bankruptcies were opened in 2024 involving private individuals and 7,743 involving insolvent legal entities (<https://www.bfs.admin.ch/ bfs/en/home/statistics/catalogues-databases.assetdetail.34907026.html>, accessed on 20.10.2025). In accordance with Art. 8 Oform *a contrario*, the cantons have the option but not the obligation to keep a **register** of certificates of insolvency. As a result, cantonal statistics on the number of certificates of insolvency issued are not always available. 4

The certificate of insolvency is **not issued** to the creditor if the debtor has not been declared bankrupt, if the ordinary or summary bankruptcy proceedings have not yet been completed, for debts in the bankruptcy estate, in the theoretical case where the proceeds of liquidation are not sufficient to cover the costs of the proceedings to be covered in the first instance (Art. 262 para. 1 LP) or when bankruptcy is suspended due to lack of assets (Art. 230 LP). In the latter case, proceedings initiated before the opening of bankruptcy proceedings are resumed after the suspension of bankruptcy (Art. 206 and 230 para. 4 LP). Creditors then have the option of pursuing the debtor by way of seizure within two years of the suspension of liquidation (Art. 230 para. 3 LP), in which case they will obtain a certificate of insolvency after seizure (see N. 11 ff. for the differences with the certificate of insolvency after bankruptcy). The question of whether this option is also available to creditors of a legal entity whose bankruptcy has been suspended due to lack of assets is controver- 5 sial. In my view, the answer is negative in most cases. Art. 159a para. 1 let. a ORC prescribes the automatic deregistration of a legal entity whose bankruptcy has been suspended due to lack of assets if no reasoned objection has been lodged within the aforementioned two-year period. Art. 230 para. 3 LP is therefore only applicable in rare cases where the legal entity has not been deleted or has been re-entered in the commercial register (e.g., if new assets are discovered). Special notices to creditors concerning the filing of the distribution table and listing the claims admitted to the statement of claims by the bankrupt debtor do not constitute acts of insolvency after bankruptcy within the meaning of Art. 265 para. 1 LP either.

6 Claims that have not been filed within the time limit specified in Art. 232 para. 2 ch. 2 LP or late in accordance with Art. 251 LP are **treated in the same way** as those certified by a certificate of insolvency and are subject to the same restrictions (Art. 267 LP). They no longer bear interest. Enforcement is conditional on the debtor's return to better fortune (see OK-Constantin, Art. 267 LP N. 10) . Even after the complete distribution of the bankrupt debtor's assets, the (late) creditor may have an interest in the collocation of their claim in order to preserve the rights provided for in Art. 265 and 269 LP, in particular the right to the issuance of a certificate of insolvency.

## B. Effects

### 1. Similarities with the certificate of insolvency after seizure

7 The effects of the certificate of insolvency after bankruptcy are governed by Art. 265 para. 1 and 2 LP. This article **refers** in part to the legal effects of the certificate of insolvency after seizure (Art. 265 para. 2, 1st sentence LP and the reference to Art. 149 para. 4 and 149a LP).

8 As with the certificate of insolvency after seizure, the claim no longer **bears interest** (Art. 149a para. 4 LP in conjunction with Art. 265 para. 2 LP; see N. 6) and is **time-barred** with regard to the bankrupt debtor for twenty years from the date of issue of the certificate of insolvency (Art. 149a para. 1 LP in conjunction with Art. 265 para. 2 LP) and for one year from the opening of the estate with regard to the heirs of the bankrupt (Art. 149a para. 1 LP in conjunction with Art. 265 LP and Art. 586 para. 2 and 567 CC, which provide for a suspension of the limitation period during the taking of inventory or the period of renunciation). Once the limitation period has expired, the certificate of

insolvency no longer has any effect. However, Art. 127 ff. CO and the ordinary limitation periods remain applicable to the co-obligors and guarantors of the bankrupt debtor, who are not affected by the special time limits of Art. 149a para. 1 LP. The limitation period is calculated in accordance with Articles 76–78 and 132 CO and may be interrupted by the means provided for in Article 135 CO.

Possession of a certificate of insolvency also constitutes a case of **seizure** 9
(Art. 265 para. 2 *i.i.* and 271 para. 1 no. 5 LP; see N. 25 ff. for the criterion of return to better fortune; see also Art. 265a LP N 9). A request for sequestration is one of the enforcement measures that may interrupt the limitation period within the meaning of Art. 135 para. 2 CO, unless the sequestration is invalid.

Finally, the reference in Art. 265 para. 2 LP also concerns the **cancellation** of 10
the certificate of insolvency. According to Art. 149a para. 2 LP, in conjunction with Art. 265 para. 2 LP (N. 7), the debtor may at any time redeem the certificate of insolvency by paying all or part of the debt to the office that issued the certificate. In this case, the office transfers the amount to the creditor or deposits it with the deposit and consignment office. The certificate of insolvency is deleted from the register of certificates of insolvency kept by the office if the entire debt has been paid by the bankrupt debtor (Art. 149a para. 3 LP in conjunction with Art. 265 para. 2 LP) and provided that such a register exists (cf. Art. 8 Oform *a contrario*; N. 4). The deleted entry shall be notified to the bankrupt debtor upon request (Art. 149a para. 3 LP in conjunction with Art. 265 para. 2 LP). If the certificate of insolvency is not entered in the debt enforcement register, in which only debt enforcement proceedings are entered with an indication of their outcome in accordance with Art. 10 Oform, the office cannot delete the entry of the certificate of insolvency in this register. The Federal Court recently clarified that a certificate of insolvency after seizure produced in bankruptcy and subject to a certificate of insolvency after bankruptcy must not be included in the section “Certificates of insolvency following seizure not extinguished in the last 20 years” of the debt collection register. Only the balance owed resulting from certificates of insolvency after seizure that were not produced in bankruptcy proceedings must be mentioned therein.

## 2. Differences with the certificate of insolvency after seizure

11 Due to the intrinsic differences between the nature of seizure (special enforcement) and bankruptcy (general enforcement), the certificate of insolvency after bankruptcy **differs** from the certificate of insolvency after seizure in the following five respects.

12 First, it does not constitute **acknowledgment of debt** within the meaning of Art. 82 LP, and therefore as a provisional release order, only if the claim has been acknowledged by the debtor during the verification of claims, regardless of whether the claim has been collated by the bankruptcy administration or is the subject of a court decision ruling on its collation within the meaning of Art. 250 LP (Art. 265 para. 1, 3rd sentence, and 244, 2nd sentence, LP, Art. 55 OAOF). For this reason, each certificate of insolvency states whether the certified claim has been acknowledged or contested by the bankrupt debtor. A certificate of insolvency that fails to state, even after the right to contest the ranking of claims has become known, whether the bankrupt debtor acknowledges or contests the claim does not constitute an acknowledgment of debt. The situation is different in the case of seizure, a procedure which in principle requires the pursuing creditor to continue the proceedings by issuing a payment order (art. 88 ff. LP; art. 149 para. 3 LP for exemption from payment order). In seizure proceedings, acknowledgment by the debtor is without effect and the certificate of insolvency constitutes acknowledgment of debt in accordance with the provisions of Art. 149 para. 2 LP.

13 If the bankrupt debtor **contests the claim**, the certificate of insolvency only proves that the bankruptcy administration or a court decision has admitted the claim against the bankrupt debtor's notice (see Art. 245 and 250 LP) . In this case, the creditor may nevertheless request and obtain relief on the basis of the other grounds for relief listed in Articles 80 to 82 LP; the debtor retains his means of defense within the meaning of these articles. If the claim is based on an enforceable judgment within the meaning of Art. 80 LP, it is in the creditor's best interest to invoke it directly, without mentioning the certificate of insolvency in the request for enforcement (OK-Constantin, Art. 265a LP N. 7), in order to request definitive release in the event of opposition.

14 Even if the debtor has acknowledged the debt in the bankruptcy proceedings, the debtor retains the **right to dispute the claim in subsequent proceedings** by bringing an action for debt relief (Art. 83 para. 2 LP) or an action for

annulment of the debt enforcement proceedings (Art. 85 et seq. LP). In fact, his "acknowledgment" constitutes an acknowledgment of debt without constituting one in the technical sense of the term, since the debtor does not intervene in the establishment of the certificate of insolvency and does not issue a declaration of intent concerning the substance of the right.

The **acknowledgment** of the claim by the debtor does not constitute strict proof of its existence, but only a rebuttable presumption of its existence. However, the certificate of insolvency after bankruptcy (like the certificate of insolvency after seizure) does not entail **novation** of the debt within the meaning of Art. 116 CO, nor does it create a new legal relationship that would duplicate the old one and give rise to a separate right of action. 15

A certificate of insolvency for a **public law claim** is therefore not a provisional release order, as there is no change in the nature of the claim (N. 15). The fiscal nature of the claims mentioned in the certificate of insolvency does not change. In this case, the (definitive) release order remains the decision or judgment on which the public law claim is based. 16

Secondly, after bankruptcy, new enforcement proceedings are necessary in view of the extinction of the bankrupt's enforcement proceedings within the meaning of Art. 206 para. 1 LP and in order to comply with the moratorium period intended by the legislator in favor of debtors who have been subject to general enforcement proceedings (N. 23). The initiation of new proceedings is conditional upon the service of a **payment order**, as Art. 265 para. 2 LP does not refer to Art. 149 para. 3 LP (see Art. 69 para. 2 LP for the content of the payment order). The exemption from the order to pay within the meaning of Art. 149 para. 3 LP (N. 12) in favor of the creditor who continues the proceedings within six months of receiving the certificate of insolvency applies exclusively after seizure proceedings. It does not apply in the event of bankruptcy. 17

Thirdly, the bankrupt debtor has the right to oppose the payment order by invoking the **exception of non-return to better fortune** in accordance with the procedure prescribed by Art. 265a LP (OK-Constantin, Art. 265a LP N. 2 ff.). Once the bankruptcy proceedings have been closed, new proceedings may be initiated at any time. It will only be successful and can only be continued if the debtor has regained financial standing (Art. 265 para. 2 and 265a–b LP). The debtor therefore has an interest in the creditor obtaining a certificate of insolvency in order to oppose the debtor's failure to recover financially in 18 subsequent proceedings. The situation is different when the proceedings are based on a certificate of insolvency after seizure, in which case the debtor may raise "ordinary" defenses to contest the claim under Art. 80 ff. LP, but not the exception of non-return to better fortune (OK-Constantin, Art. 265a LP N. 38 ff.).

19 When a **new debt enforcement** proceeding initiated after bankruptcy and carried out by way of seizure is totally or partially **unsuccessful**, the effects of the certificate of insolvency after bankruptcy remain valid. Some French-speaking authors consider, on the basis of an old Federal Court ruling written in Italian, that in this case the office issues a new certificate of insolvency after seizure with the express mention that the balance of the claim relates to a certificate of insolvency after bankruptcy. German-speaking authors are of the opinion that the office should limit itself to correcting the amount mentioned on the pre-existing certificate of insolvency after bankruptcy without issuing a certificate of insolvency after seizure. I am convinced by the latter opinion. It has the advantage of avoiding any confusion as to the nature of the certificate of insolvency. The situation differs from that in which assets that escaped liquidation are discovered after the closure of the bankruptcy (Art. 269 LP). In the latter case, the certificates of insolvency must be returned to the bankruptcy administration before the proceeds are distributed in order to be reduced accordingly. The certificate of insolvency will remain valid for the corrected amount (Art. 150 para. 2 by analogy LP).

20 Fourthly, only the bankruptcy administration (or possibly one or more assignee(s) within the meaning of Art. 260 LP) is entitled to bring an **action to set aside** (Art. 285 para. 2 LP). This action cannot be brought in its own name and on its own behalf by the creditor holding a certificate of insolvency after bankruptcy, even if the revocable act is discovered after the bankruptcy has been closed (Art. 269 para. 3 and 285 para. 2 ch. 1 *a contrario* LP). The certificate of insolvency therefore does not confer on its holder the rights mentioned in Art. 285 LP, contrary to what prevails in the case of unsuccessful seizure (Art. 149 para. 2 *i.f.* LP). In the event of assignment of rights within the meaning of Art. 260 LP, the assignee creditor shall only receive a certificate of insolvency after informing the office of the outcome of the proceedings and provided that they have not been paid in full (N. 1).

21 Fifthly, the *dies a quo* of the **limitation periods** that can be invoked against actions against third parties for damage to the creditor runs from the date of

the declaration of bankruptcy and not from the date of delivery of the certificate of insolvency (for an example, see Art. 52 LAVS concerning the pension fund's action against the administrators).

## II. EXCEPTION BASED ON NON-RETURN TO BETTER FORTUNE

### A. General

A bankrupt debtor who has not been removed from the commercial register (natural person) regains free disposal of their assets after the bankruptcy proceedings have been closed. Creditors holding certificates of insolvency after bankruptcy (Art. 265 LP) or those who did not participate in the bankruptcy proceedings (Art. 267 LP) may then initiate new proceedings for a claim prior to the bankruptcy. Such proceedings may only be **continued on condition** that the bankrupt debtor has regained financial standing or does not oppose the proceedings by contesting their regained financial standing (N 18; Art. 265a LP N 2 ff.; cf. Art. 80 ff. LP for the lifting of “ordinary” opposition). The exception can only be invoked by the former bankrupt debtor (Art. 265a LP N 2). Their heirs who have accepted the inheritance cannot invoke it and may be prosecuted on the basis of a certificate of insolvency after bankruptcy issued against the *de cujus* (OK-Constantin, Art. 265a LP N. 2 *i.f.*) . 22

The **purpose** is to enable the bankrupt debtor to recover, i.e., to build a new life after bankruptcy without constantly fearing prosecution. Conversely, it makes it possible to settle claims if the debtor has recovered financially after bankruptcy by avoiding squandering their net assets (N. 28). The rule has the effect of favoring those who became creditors of the debtor after bankruptcy, against whom the exception of non-return to better fortune is not admissible. 24 The exception of non-return to better fortune cannot be invoked by a debtor whose bankruptcy has been suspended due to lack of assets. return to better fortune is not admissible. 23

The exception of non-return to better fortune may **not be invoked** by a debtor whose bankruptcy has been suspended due to lack of assets (Art. 230 LP; N. 5). In this case, the bankruptcy is closed without a certificate of insolvency being issued to the creditors, with the result that the proceedings are resumed (Art. 230 para. 4 LP). The exception is also not admissible in the case 24 of a foreign claim relating to proceedings opened and settled abroad without any connection to a Swiss bankruptcy (see Art. 166 LDIP; OK-Constantin, Art. 265a LP N. 11).

## B. Determination of the "best fortune"

25 Art. 265 para. 2 LP specifies that the assets economically available to the debtor are considered to be the best fortune (see N. 31–32). The **"best fortune"** is not defined by law. The concept is governed by federal law. It constitutes the difference between the assets acquired after the bankruptcy and which exceed the new liabilities, excluding the debts that were the subject of the previous bankruptcy. The former bankrupt has regained better fortune if, at the time of the commencement of proceedings, he or she has, alone or with his or her spouse, in addition to a new economic existence, accumulated savings that constitute a **new net asset** enabling him or her to reintegrate into society and lead a new life in accordance with his or her personal aspirations. It is not sufficient for the bankrupt debtor's resources to exceed the minimum subsistence level set out in Art. 92 and 93 LP without constituting net assets that allow him or her to save.

26 **Property and assets** (e.g., inheritance, lottery winnings, or life insurance benefits) that accrue to the former bankrupt debtor after the closure of the bankruptcy proceedings are likely to constitute new net assets. **Income from work** is also a net asset if it exceeds the amount necessary for the debtor to lead, at the time of the review, a lifestyle in keeping with his circumstances and to enable him to save, after deduction of any "emergency reserve" that may be taken into account under cantonal practice (see also N. 29). The same applies to income from a sole proprietorship or even the debtor's sole source of income.

27 New income from work is **seizable up to the minimum subsistence level**, without applying a second-tier minimum subsistence level, when the debtor is considered to have regained financial standing. The former bankrupt debtor is thus treated on an equal footing with all other debtors by the office called upon to determine the attachable portion after the right to know of the existence of new assets (Art. 265a LP; N. 34). In the context of the subsequent seizure procedure, the return to better fortune is therefore no longer relevant.

According to the principle of **theoretical hoarding**, income may be seized regardless of whether the debtor has actually hoarded it, in particular if he has spent it abusively and with the recognizable intention to harm creditors holding certificates of insolvency after bankruptcy. In principle, the judge determines the extent of the improved financial situation by capitalizing the debtor's income during the twelve-month period preceding the request for enforcement, i.e., by calculating the average income earned during the relevant period. When the new enforcement takes place less than one year after the bankruptcy, the relevant period for calculating the theoretical accumulation remains one year from the filing of the enforcement request; the debtor's income does not fall within the estate. The question of whether seizure is possible with retroactive effect until the closure of the bankruptcy liquidation that gave rise to the issuance of the certificate of insolvency is controversial. Seizure with retroactive effect should be possible in cases of abusive squandering in order to take account of the specific circumstances. The Federal Court has not yet been seized of such a case, with case law sticking to capitalization for the year preceding the request for enforcement. In a case of theoretical hoarding, the debtor's assets are often insufficient to satisfy the creditors. The seizure will then apply to future income, i.e., for a period of up to one year, taking into account the time limit set by Art. 93 para. 2 LP. The attachment of the relevant monthly amount will take place during the coming year in accordance with the aforementioned article. In the event of a decrease in income during the period concerned, the office will, upon request, adjust the attachment by means of a decision that may be appealed under Art. 17 LP. 28

The **threshold for** a return to better fortune is calculated by taking into account the basic amount for calculating the minimum subsistence level and adding to it the essential expenses according to Art. 93 LP, unavoidable expenses, usual costs, and an allowable supplement according to the criterion of a lifestyle in keeping with the debtor's current situation, enabling them in particular to save. This additional amount is to be estimated at the discretion of the judge after an individual assessment of each situation and cannot depend on schematic criteria established by the cantons. The use of statistics to reflect changes in wages or the cost of living is excluded. Cantonal practices that uniformly took into account a certain additional percentage (50%, 66.6% or even 100%) of the basic amount of the minimum subsistence level for all debtors in the canton were deemed arbitrary by the Federal Court. However, a “limited flat rate” is permitted, in particular if the judge sets the additional 29 amount as a percentage (e.g., 50% or 66.6% ) applied to the basic amount of the minimum subsistence level after assessing the particular circumstances of the case. Where the expenses of the debtor and his or her family have been calculated broadly to take account of their lifestyle, the Federal Court considers that it is excessive to double the basic amount by applying a 100% supplement and has reduced the increase to 50%. Case law also allows for travel and representation expenses to be taken into account when these expenses include, in particular, meal or clothing expenses related to basic maintenance items. Compensation paid by the employer that is used solely to cover the debtor's office rent, secretarial or operating expenses is not income and must be excluded from the calculation. Where the debtor has a spouse or registered partner, the threshold for a return to better fortune is determined according to the rules for determining the minimum subsistence level of a married debtor.

## C. Prevention of the risk of abuse

30 In combination with the declaration of insolvency (Art. 191 LP), the exception of non-return to better fortune presents a **potential for abuse**. The 1994 revision introduced two measures to prevent this risk, by allowing the seizure of third-party assets under certain conditions (*infra* 1) and by requiring a judge to decide on the admissibility of the objection on the grounds of no return to better fortune (*infra* 2).

### 1. Seizability of assets belonging to a third party

31 The assessment of a return to better fortune now takes into account the **assets that the debtor has at their economic disposal** (Art. 265 para. 2 *i.f.* LP). The aim is to prevent abuse of rights by taking into account the objective criterion of economic reality in order to prevent the former bankrupt debtor from building up a new fortune in the name of a third party (spouse, parent, etc.) while acting as the true owner of that fortune. The judge may thus declare assets belonging to a third party to be attachable when the former bankrupt debtor has economic control over them and the third party's right was established with the intention, recognizable by the third party, of preventing the return to better fortune (Art. 265a para. 3, 2$^{nd}$ sentence LP; see OK-Constantin, Art. 265a LP N. 32 ff.). However, pursuant to Art. 95 para. 3 LP, such assets are only subject to seizure on a subsidiary basis if the debtor has no

own assets that can be seized (OK-Constantin, Art. 265a LP N. 35). For example, assets acquired in the name of the separated spouse of the former bankrupt debtor, who manages a new business on her behalf, are subject to seizure.

According to some legal scholars, it is not necessary for the debtor's conduct to constitute an **abuse of rights** within the meaning of Art. 2 para. 2 CC in order to seize assets that belong to him economically. The case law, with which I agree, seems to stick to the fact that Art. 265 para. 2 *i.f.* LP gives concrete expression to the prohibition of abuse of rights. The same applies to the Message of May 8, 1991, in which the Federal Council describes Art. 265 para. 2 LP as giving concrete expression to the prohibition of abuse of rights. In my opinion, the seizure of third-party assets is therefore only possible if the conditions of Art. 2 para. 2 CC are met. 32

The **third party** is not a party to the proceedings in which the admissibility of the objection on the grounds of improved financial circumstances is examined by the judge. During the seizure phase, the third party must therefore assert its rights by means of a claim (Art. 106 to 109 LP; OK-Constantin, Art. 265a LP N. 37). 33

### 2. Role of the judge

The revision has also improved the position of the creditor in the proceedings. Indeed, the opposition for non-return to better fortune must be **declared admissible by the judge** (Art. 265a para. 2 and 3 LP; see specifically OK-Constantin, Art. 265a LP N. 17 ff.). 34

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COMMENTARY ON

# Art. 265a DEBA

A commentary by Arnaud Constantin

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**2. Establishing new assets**

**Art. 265*a***

[1] If the debtor files an objection to the summons for payment on the grounds that he has not acquired new assets, the debt enforcement office shall submit the objection to the court at the place of debt enforcement. The court shall hear the parties and issue a decision; there is no right of appeal against the decision.

[2] The court shall approve the objection to the summons if the debtor sets out his income and financial circumstances and credibly demonstrates that he has not acquired any new assets.

[3] If the court does not approve the objection to the summons, it shall establish the extent of the new assets (Art. 265 para. 2). The court may declare assets of third parties over which the debtor has economic

control to be distrainable if the third party's right is based on an act carried out by the debtor with the intention, recognisable to the third party, of thwarting the creation of new assets.

4 The debtor and the creditor may file an action to contest or establish the new assets in the court at the place of debt enforcement within 20 days of receiving notice of the decision on the objection.

# CONTENT

# I. PROCEDURE

1 Art. 265a LP regulates how to deal with objections on the grounds of failure to return to better fortune. The debtor must first raise the objection (*infra* A). The procedure is then divided into two judicial phases, preceded by a preliminary non-judicial phase. During the preliminary phase, the office verifies the formal aspects of the objection (*infra* B). During the first judicial phase, the judge issues a decision on its admissibility (*infra* C). Following this decision, the creditor and the debtor may, in a second phase, bring an action for a declaration of return or non-return to better fortune (*infra* D).

## A. Opposition on the grounds of non-return to better fortune (Art. 265a para. 1 LP)

### 1. Grounds for opposition

2 The office does not automatically examine whether the formerly bankrupt debtor has regained financial standing. The debtor must **personally** invoke the exception by filing an opposition to the order to pay or to the request for preferential treatment (Art. 111 para. 4 LP). The objection can only be invoked by a natural person against whom one or more certificates of insolvency have been issued following the closure of bankruptcy proceedings (OK-Constantin, Art. 265 LP N. 1). The legal personality of a legal entity does not survive these proceedings (Art. 159a para. 1 let. b ORC; OK-Constantin, Art. 267 LP N. 5) . The objection has effect vis-à-vis the creditor and any successors (heirs, assignees, etc.). It is also enforceable against claims whose holders did not participate in the bankruptcy or whose claims were not collated (N. 8; Art. 267 LP; OK-Constantin, art. 267 LP N. 10), but not to claims arising after the opening of bankruptcy proceedings (N. 12). The right to file an objection on the grounds of non-return to better fortune does not pass to the heirs of the former bankrupt debtor, who may renounce the succession (art. 566 ff. CC) .

3 Art. 265a LP is a *lex specialis* in relation to Art. 74 and Art. 75 para. 1, 1$^{st}$ sentence LP, according to which it is not necessary to give reasons for the objection. Debtors who contest their return to financial prosperity must therefore **expressly state** this in their opposition, failing which they forfeit the right to assert this defense (Art. 75 para. 2 LP). This forfeiture excludes the procedures

under Art. 85, 85a, and 86 LP. The objection may relate to the non-existence of new fortune, the claim itself, or both. It will be considered a simple challenge to the claim if it is not substantiated ("ordinary objection" to be lifted in accordance with the procedures set out in Art. 79 ff. LP; N 39 ff.). Opposition on the grounds of non-return to better fortune does not limit the debtor's ability to contest the extent or existence of the claim. The office will examine whether the debtor has filed an objection on the grounds of no return to better fortune before forwarding it to the judge, if necessary (N. 12). At this stage, supporting documents are superfluous (cf. N. 20 and N. 30).

In practice, the requirement to state reasons is interpreted flexibly and does not require the debtor to file an objection using the precise words "*no new assets*." **For example**, objections stating the following reasons have been deemed sufficient: "*situation unchanged*," "*I have not regained my financial standing*" ("*bin zu keinem neuen Vermögen gekommen*"), " *I cannot pay anything*" ("*ich kann nichts zahlen*") or "*objection no better/new fortune*" ("*Rechtsvorschlag kein neues Vermögen*"). However, the mere statement "*I am raising an objection*" ("*Ich erhebe Rechtsvorschlag*") is not sufficient. 4

The objection and its scope are interpreted in accordance with the principle of good faith. According to case law, unless expressly stated otherwise, the debtor's objection on the grounds of no return to better fortune also includes an **objection to the claim itself** (N. 39 ff.). For example, the absence of punctuation between the terms "*objection no new fortune*" ("*Rechtsvorschlag kein neues Vermögen*" ; N. 4) does not allow the two parts of the statement to be clearly distinguished and to say that the objection is based solely on the lack of new assets. However, the Federal Court has ruled that the objection relates only to the return to better fortune if the debtor makes an "*objection due to lack of new assets*" ("Rechtsvorschlag da kein neues Vermögen vorhanden"). 5

In the event of **withdrawal of** the objection on the grounds of no return to better fortune and in the absence of express clarification, cantonal case law and doctrine consider, out of consideration for the debtor, that there is no waiver of the objection to the claim itself. The principle of interpretation "*in dubio pro debitore*," which favors one of the parties and prevailed in the past, is excluded for the rest (N. 5 for interpretation according to the principle of trust). 6

7 Under penalty of forfeiture (N. 3), the objection for failure to return to better fortune must be lodged **within the objection period**, i.e., within ten days of notification of the order to pay (Art. 74 para. 1 LP and Art. 75 para. 2 LP in conjunction with Art. 265 para. 1 LP; cf. Art. 265a LP N. 10; cf. Art. 35 and 33 para. 2 LP for the possibility of granting a longer period or extending the period). A debtor who has filed an opposition without stating reasons may supplement it within this period, but not at a later stage of the proceedings (Art. 75 para. 2 LP). An extension of the time limit is possible under the conditions of Art. 33 para. 4 LP. Unless there are excusable grounds, the restoration of the time limit in favor of a debtor who did not realize that the debt enforcement was based on an act of insolvency after bankruptcy is excluded (Art. 265 LP N 15; Art. 265a LP N 8). In case of doubt, the former bankrupt debtor should give reasons for his opposition (N. 3 s.) and invoke the exception of non-return to better fortune. Except for revocation proceedings (Art. 288 LP), new creditors have no claim against the former bankrupt debtor if he fails to assert the exception against a creditor with a claim from a previous bankruptcy.

## 2. Claim established by an act of insolvency after bankruptcy

8 Opposition on the grounds of non-return to better fortune concerns claims deduct-
ed in proceedings prior to bankruptcy that have been established by an **act of insolvency after bankruptcy** or that fall under **Art. 267 LP**. Where an act of insolvency after bankruptcy exists, the creditor is not required to mention it in the enforcement request, as this certificate does not constitute a novation (Art. 265 LP N 15) and does not constitute a debt instrument per se (see Art. 67 LP for the content of the enforcement request).

9 A creditor who has a certificate of insolvency after bankruptcy may request a **seizure** against the former bankrupt debtor (Art. 271 para. 1 no. 5 LP; Art. 265 LP N 9). Once the seizure has been ordered, the former bankrupt debtor may raise the objection of non-return to better fortune by filing an objection with the judge within ten days of becoming aware of the seizure against him (Art. 278 LP). The procedures set out in Art. 265a para. 1 to 3 LP will be initiated at the stage of enforcement to validate the seizure in the case of seizure without prior enforcement (Art. 279 LP) or at the stage of proceedings prior to the request for seizure in the event of prior proceedings. The office is not competent to examine the merits of the exception; it is required to execute the

seizure order (Art. 274 ff. LP). The judge ruling on the admissibility of the objection for failure to return to better fortune within the meaning of Art. 265a para. 1 LP is not bound by the assessment of the attachment judge on the existence or non-existence of better fortune (see for the procedure: N. 17 ff.).

After leaving open the question of the context in which the objection for failure to return to better fortune arises, the Federal Court ruled that the limitation imposed by the requirement of a return to better fortune affects the **legal relationship** giving rise to the claim included in a previous bankruptcy. The exception can thus be raised and have substantive legal effects outside of enforcement proceedings. In other words, the former bankrupt debtor may invoke it as soon as such a claim is invoked to his detriment, whether in the context of enforcement proceedings (including against a possible assignee; N. 1) or outside of enforcement. The latter case arises, for example, when the debtor defends himself against a creditor who holds a certificate of insolvency after bankruptcy and who invokes his claim as compensation (Art. 120 CO) in order to extinguish a new claim by the former bankrupt against him (i.e., a claim arising after the previously liquidated bankruptcy; N 8). According to Jeandin, the exception of non-return to better fortune should even be invoked in the event of bankruptcy without prior prosecution at the request of the creditor who would assert a claim resulting from a certificate of insolvency after bankruptcy (Art. 190 LP). 10

An objection on the grounds of non-return to better fortune is **not admissible** when the claim has been established by an act of insolvency after seizure, unless it is made for a claim established by an act of insolvency after bankruptcy (Art. 265 LP N 19) or which relates to a claim that arose before the opening of bankruptcy proceedings and which did not participate in the liquidation (Art. 267 LP; N. 8). Nor is it admissible against an act of insolvency resulting from foreign bankruptcy (Art. 265 LP N 24). All of the Swiss assets of the former bankrupt debtor must have been subject to general enforcement in order for him to be able to invoke Art. 265 et seq. LP relating to non-return to better fortune. This is the case when a foreign bankruptcy decision is recognized in Switzerland in accordance with Art. 166 et seq. LDIP. 11

## B. Examination of the opposition by the office (Art. 265a para. 1 LP)

12 The examination of the opposition by the office is purely formal. It concerns compliance with the ten-day time limit (N 7) and the requirement to state reasons (N. 3), but not on the existence and closure of a previous bankruptcy, the time when the claim arose, or the validity of the exception for no return to better fortune (these latter elements being examined by the judge; see N. 17 ff. and N. 26 ff.). Following the preliminary examination, the objection is submitted **ex officio** to the judge of the forum of the enforcement proceedings without any introductory act on the part of the debtor. In order to avoid unnecessarily overburdening the courts, it is accepted practice in Zurich for the office to inform the creditor of the objection on the grounds of non-return to better fortune filed by the debtor, giving the creditor ten days to withdraw the debt collection proceedings, failing which the objection will be submitted to the competent judge. This practice serves to streamline the procedure, but adds a step—namely, setting a deadline for the creditor to “confirm” the debt collection—which is not provided for by law.

13 The interpretation of Art. 265a para. 1 LP in case law is **formalistic**. The case is therefore referred to the judge even if the objection is manifestly inadmissible. This is the case if the debtor has never been declared bankrupt, if the bankruptcy has been suspended due to lack of assets (Art. 230 LP; Art. 265 LP N 24), if the bankruptcy has been revoked (Art. 195 LP) or if the claim pursued arose after the opening of bankruptcy proceedings.

14 A **complaint** may be lodged within the meaning of Art. 17 LP if the office refuses or delays forwarding the objection on the grounds of non-return to better fortune to the judge, even if this is for reasons related to the admissibility of the objection or the exception of non-return to better fortune itself. The absence of a decision by the office on the formal validity of the objection without transmission to the judge constitutes a denial of justice that may be the subject of a complaint (Article 17(3) LP).

15 A decision by the office that informs the debtor of the remedies available to them, incorrectly mentioning the possibility of invoking non-return to better fortune before the judge (instead of automatic transmission; N. 12), is **voidable** but not null and void. The debtor is required to respond in such a case,

failing which the possibility of bringing the matter before the court within the meaning of Art. 265a para. 1 LP is forfeited.

The **supervisory authority** is competent to examine, upon complaint, whether the objection is formally valid (N. 3, N. 7 and N. 12). 16

## C. Judicial decision on the admissibility of the objection (Art. 265a para. 1–3 LP)

### 1. Procedural aspects

The court examines the admissibility of the objection after hearing the parties orally or in writing (Art. 265a para. 1 LP; Art. 252 et seq. CPC) . He or she shall rule definitively on all aspects relating to the exception of non-return to better fortune, including on questions of formal admissibility already examined by the office (N. 12 and N. 23). The **summary procedure** shall apply (Art. 251(d) CPC). There shall be no prior conciliation (Art. 198(a) CPC). 17

The **jurisdiction based on the location** of the court of the place of enforcement is mandatory and expressly reserved by Art. 46 CPC in conjunction with Art. 265a para. 1 LP. The place of jurisdiction for debt enforcement is determined in accordance with Art. 46 ff. LP and may change during the proceedings if the creditor becomes aware of the relocation of the formerly bankrupt debtor (Art. 53 *a contrario* LP). Cantonal law determines **substantive jurisdiction** (Art. 4 CPC). Given the identical nature of the proceedings, the creditor may obtain the lifting of the opposition against the claim itself in the same proceedings (N. 39 ff.) provided that the substantive jurisdiction of the judge ruling on the opposition is the same as that of the lifting of the opposition. This constitutes a joinder of actions within the meaning of Art. 90 CPC. A joinder of cases is also possible if the lifting procedure is already pending (Art. 125(c) CPC; N. 38 ff.). 18

The **advance on costs** is paid by the formerly bankrupt debtor, subject to legal aid (Art. 117 et seq. CPC). The debtor assumes the role of plaintiff within the meaning of Art. 98 CPC, since his opposition on the grounds of non-return to better fortune automatically results in the matter being brought before the judge (N. 12). The advance payment of costs may cover the totality of the presumed legal costs (Art. 98 para. 2 let. c CPC). Art. 48 OELP applies to the determination of legal costs. Decisions relating to advances on costs may be 19 appealed within ten days (Art. 103 CPC in conjunction with Art. 319(b)(1) and Art. 321(2) CPC). The Federal Court has ruled that it is not arbitrary to apportion the costs proportionally between the debtor and the creditor on the basis of objective grounds (e.g., to take into account the creditor's difficulty in assessing the debtor's financial situation when initiating enforcement proceedings and the debtor's refusal to cooperate, or to draw conclusions from the creditor's failure to reduce their claims after reviewing the documents produced by the debtor; see N. 22 for challenges to decisions on costs). There is a specific feature in the canton of Vaud. According to section 2 of Circular No. 34 of the Vaud Cantonal Court of April 22, 2014, the judge systematically refrains from requiring an advance on costs in this canton. This circular appears to be contrary to Art. 98 CPC, as the question of whether and to what extent an advance on costs may be required is to be examined by the judge in each individual case and is at his or her discretion.

20 Proof is provided by means of documents (Art. 254 para. 1 CPC). Other means of proof are admissible under the conditions of Art. 254 para. 2 CPC. The former bankrupt debtor bears the burden of proof. He must openly disclose his income and financial situation and make it **plausible** that he has not returned to better fortune (Art. 265a para. 2 LP; Art. 265 LP N. 28 for the decisive moment). The former bankrupt debtor must provide concrete evidence that his fortune has not improved, for example by producing bank statements, salary certificates, contracts (lease agreements, employment contracts, etc.), a judgment ordering him to pay alimony, budgets, tax returns and assessments, etc. They must also produce all documents enabling their fortune to be distinguished from assets over which they have economic control and which belong to a third party (Art. 265a para. 3 LP; N. 32 ff.; Art. 265 LP N. 31 ff.). The question of whether the inquisitorial principle applies is controversial (Art. 255(a) CPC). In my opinion, it does. Although the initiative for the proceedings comes from the creditor, the creditor has the role of the defendant (or respondent). As far as possible, the creditor shall produce all documents proving, from a probability perspective, the existence of new assets belonging to the formerly bankrupt debtor and/or assets over which the latter has economic control.

21 The purpose of the opposition proceedings is to allocate the roles of the parties in any subsequent declaratory action (Art. 265a para. 4 LP; N 26 ff.), to enable the creditor to assess the chances of success of such an action after ex-

amining the documents produced by the debtor (cf. N. 3) and to serve the principle of procedural economy by avoiding ordinary proceedings if the parties waive them.

## 2. Decision and absence of legal remedy

The judge declares the opposition **admissible** if he considers that the debtor has not regained his fortune (Art. 265a para. 2 LP). On the other hand, he declares the opposition **inadmissible** if he finds that the debtor's financial situation has improved and determines, where applicable, the total amount by which the debtor's financial situation has improved (Art. 265a para. 2, 1st sentence LP; Art. 265 LP N. 25 ff.) . In the latter case, the seizure will be carried out by the office in accordance with Art. 92 ff. LP. The part of the decision concerning costs and expenses and their allocation is subject to appeal within ten days (Art. 110, 319 let. b ch. 1 and 321 para. 2 CPC). In most cases, this appeal is followed by a subsidiary constitutional appeal to the Federal Supreme Court within thirty days (Art. 113 ff. LTF), as the costs of summary proceedings do not generally reach the value in dispute of CHF 30,000, which opens the way for an appeal in civil matters (Art. 74 para. 1 let. b LTF; N. 19) . 22

Apart from the question of costs and expenses, the substantive decision of the court of first instance on the existence of a return to better fortune is not subject to **any appeal at the cantonal level** (Art. 265a para. 1, 2nd sentence LP). Art. 265a para. 1 LP is a special provision that derogates from the principle of two instances and the requirement for a higher court under Art. 75 para. 2 LTF. The decision thus rendered is in principle not subject to appeal in civil matters before the Federal Supreme Court (see N. 24 for the exception developed in the presence of formal defects). In order to challenge it and, in particular, to challenge a misapplication of debt enforcement law, the unsuccessful party must bring an **action for a declaratory judgment** as provided for in Art. 265a para. 4 LP (N. 26 ff.). This action must be mentioned in the indication of legal remedies at the bottom of the decision rendered pursuant to Art. 265a para. 1 LP, which serves as a means of reviewing the decision on opposition. 23

However, the Federal Court has developed an **exception** in the event of a violation of procedural rules that cannot be invoked in an action based on Art. 265a para. 4 LP, such as a violation of the appellant's **right to be heard** (Art. 29 para. 2 Cst.; Art. 53 CPC). This formal defect, which can be invoked re- 24 gardless of its impact on the outcome of the proceedings, opens the way to civil law appeals to the Federal Supreme Court (Art. 72 para. 2(a) and 75 para. 1 LTF) or a subsidiary constitutional appeal (Art. 113 LTF) if the amount in dispute – which corresponds to the amount of the debt enforcement proceedings – does not reach CHF 30,000 (Art. 74 para. 1(b) LTF). In the latter case, case law considers, by way of derogation from the requirement of two cantonal instances (Art. 75 para. 1 LTF; N. 23), that the appeal is admissible for violation of federal law (Art. 95 let. a LTF) or for violation of constitutional rights in the case of a subsidiary constitutional appeal (Art. 116 LTF) . To date, the Federal Supreme Court has left open the question of whether such an appeal is available for violations of other procedural guarantees, such as the right to an impartial and independent court (Art. 29 para. 1 Cst.; N. 28).

25 When the judge **does not enter into the merits of the case** and does not rule on the admissibility of the opposition on the grounds of non-return to better fortune (for example, if the debtor has failed to produce the personal bankruptcy decision [not accessible in a public register]; N. 13), cantonal doctrine and case law apply Art. 309(b) CPC and consider that an appeal in the strict sense lodged within ten days (Art. 319 ff. CPC) is available against the decision of inadmissibility of the objection rendered in summary proceedings. Even though the issue has not yet been decided by the Federal Court, this approach is convincing: only decisions on the merits that rule on substantive matters of debt enforcement law are not subject to cantonal appeal (N. 23). As the legal remedies available are unclear and cantonal practices may be contradictory, a prudent litigant would be well advised in such a case to lodge both an appeal (within ten days; Art. 321 para. 2 CPC) and an action for a declaratory judgment within the time limit specified in Art. 265a para. 4 LP (N. 26).

## D. Declaratory action (Art. 265a para. 4 LP)

### 1. Procedural aspects

26 If unsuccessful at the end of the procedure prescribed by Art. 265a para. 1 LP, the debtor or creditor may bring an **action on the merits** to establish non-return or return to better fortune before the judge of the place of enforcement within **twenty days** of notification of the decision on the objection (N. 22 ff.). Since the entry into force of the revision of the CPC on January 1, 2025, Art. 145 para. 4 CPC provides that the provisions of the CPC on the suspension of

time limits apply to all actions under the LP to be brought before a judge. In the event of an unmotivated decision, the *dies a quo* of the twenty-day period shall run from the date of notification of the operative part within the meaning of Art. 239 para. 1 CPC.

The action for a declaratory judgment is positive when it is brought by the creditor. It is negative when it is brought by the former bankrupt debtor. The action relates to a **purely legal enforcement** procedure and constitutes an incidental issue of enforcement law aimed at determining whether or not the creditor may continue the enforcement proceedings (N. 38 ff.). The subject matter of the dispute is limited by the plaintiff's conclusions. It may relate to the existence and determination of new assets and/or the consideration and seizure of assets over which the debtor has economic control (N. 32). 27

**Jurisdiction based on location** is mandatory (Art. 265a para. 4 LP *cum* Art. 46 CPC). Based on Art. 53 *a contrario* LP, Bohnet allows a change of venue during proceedings if the creditor is aware of the debtor's change of domicile (see also N. 18). **Subject-matter jurisdiction** is determined by cantonal law (Art. 4 CPC). The judge who declared the opposition for non-return to better fortune admissible must not be the same as the judge in the declaratory action brought by the debtor (prohibition of “personal union”). According to case law, such a combination of functions contravenes the guarantee of an impartial court (Art. 30 para. 1 Cst., Art. 6 § 1 ECHR; N. 24). 28

Depending on the value in dispute, the action is subject to ordinary **procedure** (Art. 219 ff. CPC) or simplified procedure (Art. 243 ff. CPC). The value in dispute corresponds to the amount covered by the requested finding, i.e., the amount of the claim deducted in the event of a positive declaratory action (N. 27) . Although this case is rather theoretical, summary proceedings may apply if the plaintiff, in possession of immediately available evidence, chooses the route of protection of clear cases (Art. 248(b) and 257 CPC *cum* Art. 254 CPC). Regardless of the applicable procedure, prior conciliation is excluded by Art. 198(e)(7) CPC. The parties may obtain legal aid if the conditions of Art. 117 et seq. CPC are met. In my opinion, it is in the debtor's interest to apply for legal aid, since failure to do so could already be interpreted as an indication of his return to better fortune. 29

The maxim of debate applies (Art. 55 para. 1 CPC and Art. 255 *a contrario* CPC) without restriction of the means of evidence (cf. N. 20). The degree of 30 proof is that of strict proof (cf. N. 20). Regardless of his role in the proceedings, the creditor has the **burden of proof** of the existence of new wealth (Art. 8 CC). It is up to the former bankrupt debtor to allege the facts and provide evidence to determine his expenses, the amount necessary to lead a life in accordance with his condition (Art. 265 LP N 25) and the non-existence of new wealth. In any event, he must cooperate in the the administration of evidence. In the event of refusal, Art. 164 CPC applies and the judge may take into account at least the basic amount for calculating the minimum subsistence level, adding the corresponding supplement (Art. 265 LP N 29; cf. Art. 107 para. 1 let. f CPC for the possibility of apportioning costs equitably in this case).

31 The decision rendered at the end of the declaratory action within the meaning of Art. 265a para. 4 LP is a final decision according to Art. 236 CPC. It may be appealed if the value in dispute reaches CHF 10,000 (Art. 308 para. 2 CPC). The strict **appeal** procedure (Art. 319 ff. CPC) is available for a lower value in dispute. Art. 142 ff., 311 para. 1 and 321 para. 1 CPC are applicable, to the exclusion of Art. 56 ff. LP, for the calculation and suspension of time limits (see also N. 26). The decision of the higher cantonal authority on the declaratory action may be appealed in civil matters to the **Federal Supreme Court** (Art. 72 ff. LTF). A subsidiary constitutional appeal (Art. 113 ff. LTF) may be lodged if the minimum value in dispute of CHF 30,000 (Art. 74 para. 1 LTF) is not reached. In this case, the appellant's grievances are limited to the violation of constitutional rights (Art. 116 LTF). The time limits for appeals to the Federal Supreme Court are governed and calculated by the LTF.

### 2. Declaration of the attachability of assets belonging to a third party

32 If the judge declares the opposition for non-return to better fortune inadmissible, he or she may determine the extent of the new fortune of the formerly bankrupt debtor by declaring assets belonging to a third party attachable under the following **three conditions**.

33 First, the debtor must **have economic disposal** over these assets (Art. 265a para. 3, 2$^{nd}$ sentence LP).

34 Second, the third party's right must have been **established** by the debtor with the **intention, recognizable** by the third party, of preventing the return to better fortune (Art. 265a para. 3, 2$^{nd}$ sentence LP; Art. 265 LP N 31) . The con-

cept of “*right established in favor of the third party*” is interpreted broadly. It presupposes the establishment of a mechanism that is objectively capable of legally reducing the assets of the formerly bankrupt debtor or preventing their increase. This refers both to an act committed by the debtor (e.g., formal transfer of ownership) and to an omission by the third party (e.g., making an asset available without transferring ownership to the debtor), provided that it is accompanied by a subjective element. This element includes the concept of “*intention recognizable by the third party*,” which corresponds to that of fraud in revocation actions (Art. 288 LP).

Thirdly, Art. 95 para. 3 LP requires the **seizure as a last resort** of property belonging to third parties. Such seizure implies that the debtor's assets alone will not be sufficient to fully satisfy the creditor (Art. 265 LP N 31). This condition is examined by the office at the time of seizure. 35

Like Art. 265 para. 2 LP, Art. 265a para. 3 LP concerns assets belonging to third parties but over which the debtor has economic control. However, only the application of Art. 265a para. 3 LP has an impact on the legal situation of the third party. Art. 265 para. 2, 3rd sentence LP makes it possible to determine whether or not the former bankrupt debtor has regained financial standing without affecting the legal situation. The **distinction between Art. 265 para. 2 and Art. 265a para. 3 LP** is therefore as follows: the mere consideration of assets belonging to third parties in order to determine the debtor's new fortune in accordance with Art. 265 para. 2 LP does not yet affect the legal situation of the third party. The situation is different in the case of a declaration of seizure within the meaning of Art. 265a para. 3, 2nd sentence LP, which always implies seizure of these assets. 36

A third party affected by a declaration of attachability of assets belonging to them is not a party to the proceedings under Art. 265a LP and does not have standing to challenge the decision on the admissibility of the opposition (N. 22 ff.) or the declaratory actions under Art. 265a para. 4 LP (N. 26 ff.). They must assert their rights to the seized assets by means of a **claim** within the meaning of Articles 106 to 109 LP, which will focus on the failure to meet the conditions of Article 265a(3) LP. According to legal doctrine, the third party may play a role in the declaratory action, in particular through a principal or ancillary intervention (Article 73 et seq. CPC). They may also be called as a witness in the action, or even as an immediately available witness if they accompany the party relying on their testimony at the hearing appointed to de- 37 cide on the admissibility of the opposition (despite the summary nature of this procedure; N. 17).

# II. EFFECTS OF THE OPPOSITION ON THE DEBT ENFORCEMENT PROCEEDINGS

## A. Lifting of the opposition

38 The opposition for failure to return to better fortune and the decision on the admissibility of the opposition only have effect in the **ongoing debt enforcement** proceedings (N. 27). The existence of new assets will be re-examined in subsequent debt enforcement proceedings between the same parties and relating to the same claim, taking into account the fact that other creditors may have been paid off in the meantime or may have obtained a share of the new assets as a result of previous debt enforcement proceedings.

39 The effects of the objection raised by the formerly bankrupt debtor on the debt collection proceedings depend on its scope. Proceedings to lift the objection are superfluous if the claim as such is recognized and the objection is expressly limited to the non-return to better fortune (N. 5). If it is also directed against the claim, the judge under Art. 265a para. 1 to 3 LP will not examine the opposition to the claim itself. This must be lifted by the court before the debt collection proceedings can continue. This can be done by means of a definitive lifting procedure within the meaning of Art. 80 s. LP, by a provisional release procedure within the meaning of 82 s. LP or by an action for recognition of debt under Art. 79 LP. The law does not provide for any coordination rules. According to Jeandin, the judge called upon to rule on the admissibility of the objection should **call upon** the debtor to clarify the scope of his objection in case of doubt. An unclear objection that has not been clarified by the debtor at the request of the office should, in my opinion, be treated as an unmotivated objection, which only concerns the claim (N 3), so that a request for clarification by the judge does not seem necessary.

40 An objection on the grounds of failure to return to better fortune does not in itself suspend the course of the proceedings (cf. Art. 78 para. 1 LP). However, the proceedings are **suspended** if the judge declares the objection on the grounds of failure to return to better fortune to be entirely admissible. In this case, the creditor may not request the lifting of the objection against the claim

before the action for a declaration of return to better fortune becomes final (Art. 265a para. 4 LP), and the judge will not consider a request for lifting.

However, the creditor may request the **lifting of** the opposition to the claim as soon as the judge has declared the opposition for non-return to better fortune inadmissible (in whole or in part). The decision on the opposition, even if made on the basis of prima facie evidence (N. 20), is sufficient to protect the former bankrupt debtor against his former creditors, who in such a case do not have to wait for the outcome of the negative action for a declaration brought by the debtor (Art. 265a para. 4 LP). A creditor whose claim is not or no longer contested may also request a provisional seizure or inventory (Art. 83 para. 1 and 162 by analogy LP) before the outcome of the above-mentioned action, as soon as the decision on the admissibility of the opposition is in their favor. 41

If the debtor is unsuccessful in the provisional release proceedings before a decision is made on the action under Art. 265a para. 4 LP, the debtor cannot wait for the outcome of the declaratory action. The debtor must bring an **action for debt relief** within 20 days of the release (Art. 83 para. 2 LP). To avoid duplicating proceedings and the risk of contradictory decisions, it would be advisable to immediately request the suspension of the proceedings under Art. 83 para. 2 LP until a decision is made on the action under Art. 265a para. 4 LP (Art. 126 CPC). 42

The entry into force of a decision establishing the non-existence of new assets of the formerly bankrupt debtor definitively **paralyzes** the proceedings. It renders *ex lege* moot any release proceedings, whether pending or decided, as well as any provisional measures ordered pursuant to Art. 83 para. 1 LP (N. 41). In the absence of proceedings to be set aside, any pending action for debt relief would, in my opinion, become irrelevant in such a situation. 43

## B. Continuation of proceedings

If the debtor has invoked the exception of non-return to better fortune, the proceedings may not be continued within the meaning of Art. 88 LP only after the decision on the exception has become final. Except in cases where the former bankrupt debtor does not file an objection on the grounds of non-return to better fortune, the continuation of the proceedings is therefore subject to the following three **conditions**. 44

45 First, the existence of a **new fortune** of the former bankrupt debtor must have been **definitively established**. This is the case if the debtor does not file a declaratory action against a decision of inadmissibility of the objection on the grounds of non-return to better fortune or, in the event that an action within the meaning of Art. 265a para. 4 LP has been brought, if the decision establishing the return to better fortune has become final. If the judge declares the opposition inadmissible, the amount by which the debtor's financial situation has improved, as determined by the judge (Art. 265 para. 2 LP *cum* Art. 265a para. 3 LP), which is in principle less than the amount of the claim pursued, will correspond to the amount up to which the proceedings may continue. It will also depend on the outcome of the release proceedings aimed at setting aside the opposition if it also affects the claim.

46 Secondly, if the opposition was also directed against the claim, the opposition must have been set aside by the procedures under **Art. 79 to 84 LP** (N. 38 ff.). Such a procedure is unnecessary when the opposition concerns only the failure to return to better fortune (N. 5); the continuation of the proceedings may be requested as soon as the exception has been definitively decided in accordance with Art. 265a LP.

47 Thirdly, the **time limit** of one year from the notification of the payment order must be observed (Article 88(2) LP). This time limit does not run until the exception for non-return to better fortune has been definitively dismissed.

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COMMENTARY ON

# Art. 265b DEBA

A commentary by Arnaud Constantin

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**3. Exclusion of declaration of bankruptcy at the request of the debtor**

**Art. 265*b***

If the debtor opposes debt enforcement proceedings by denying that he has new assets, he may not apply to be declared bankrupt (Art. 191) for the duration of these proceedings.

# CONTENT

## I. BANKRUPTCY AT THE DEBTOR'S REQUEST

The judge shall declare bankruptcy for a debtor who files for insolvency in court and pays the advance on costs on time or is exempt from doing so, unless (i) an amicable settlement of the debts is possible (Art. 191 para. 2 LP *cum* Art. 333 ff. LP), (ii) if the debtor is already bankrupt (Art. 206 para. 3 LP [prohibition of parallel bankruptcies]), or (iii) if the debtor has invoked the failure to return to better fortune (OK-Constantin, Art. 265b LP [prohibition of chain bankruptcies]). The article in question prohibits a former bankrupt debtor from filing for bankruptcy under Art. 191 LP for the duration of any proceedings brought against them for a debt included in a previous bankruptcy and against which they have filed an objection on the grounds of no return to financial standing (N. 5). The prohibition applies to all proceedings against the former bankrupt, including if they are again subject to general enforcement proceedings (Art. 39 LP). 1

Prior to the 1994 revision, the debtor could circumvent the system and escape new proceedings brought against him for a debt arising before the opening of bankruptcy proceedings by filing an objection on the grounds of no return to better fortune and declaring himself insolvent in court. In this case, the creditor, who held a certificate of insolvency after the (first) bankruptcy, would only receive a possible dividend at the end of new general enforcement proceedings. Not only did the enforcement proceedings lose their purpose, but their success also depended on the debtor's behavior. Since the above-mentioned revision, the legislature has limited the debtor's ability to file for bankruptcy in order to prevent abusive declarations of insolvency by former bankrupts, thereby strengthening the position of creditors holding a certificate of insolvency. The aim is to **ensure the effectiveness of Art. 265 et seq. LP** and to guarantee the effective seizure of the former bankrupt's assets. 2

According to the majority of legal scholars and Zurich practice, the debtor should generally not be able to file for personal bankruptcy as long as proceedings concerning a claim included in a previous bankruptcy are pending. Some authors interpret Art. 265b LP *a fortiori*. In their view, the prohibition on filing for personal bankruptcy would apply even if the debtor has **not lodged an objection** on the grounds of non-return to better fortune or has **withdrawn** such an objection. Other authors and the Zurich Obergericht base their opinion on the prohibition of abusive insolvency declarations and 3 reach the same conclusion. I agree with the latter opinion, which is also based on a teleological interpretation of the law after the revision (N. 2). The aim is to prevent the debtor from circumventing Art. 265 to 265b LP and Art. 191 LP by withdrawing his objection or failing to object on the grounds of non-return to better fortune in order to file for his own bankruptcy.

4 The judge called upon to rule on bankruptcy at the debtor's request within the meaning of Art. 191 LP shall examine **ex officio** whether the debtor has already been subject to bankruptcy proceedings and, if so, whether the debtor has raised the defense of non-return to better fortune in ongoing proceedings concerning a claim arising before the bankruptcy (Art. 255(a) CPC). According to Zurich practice, the judge may even retroactively declare the bankruptcy null and void without regard to Art. 265b LP.

5 The prohibition on filing for one's own bankruptcy applies from the closure of the (first) bankruptcy. It continues until the end of the enforcement proceedings in which the debtor has filed an objection on the grounds of no return to better fortune (N. 1). It ends when the proceedings are terminated, when the judge declares the objection on the grounds of no return to better fortune admissible, or if the debtor wins the proceedings provided for in Art. 265a LP (OK-Constantin, Art. 265a LP N. 17 ff. and N. 26 ff.). If the debtor is considered to have regained financial standing, the prohibition remains in force until the end of the enforcement proceedings, i.e. until it is clear that their "ordinary" objection to the claim (OK-Constantin, Art. 265a LP N. 38 ff.) cannot be lifted, until the funds have been realized and distributed or until the debt enforcement proceedings have expired (art. 88 para. 2 LP).

## II. BANKRUPTCY AT THE REQUEST OF THE CREDITOR

6 Art. 265b LP only prevents bankruptcy without prior enforcement at the request of the debtor. **New bankruptcy at the request of the creditor remains possible**. Such bankruptcy will concern a claim arising after the opening of the first bankruptcy. It is subject to the former bankrupt still being subject to bankruptcy proceedings (Art. 39 LP) or to bankruptcy without prior enforcement proceedings under Art. 190 LP being considered.

7 Claims for which a certificate of insolvency has already been issued are not given priority in the new bankruptcy. They are **treated in the same way** as

claims arising after the first bankruptcy. New creditors are not given priority either. The principle of equality of creditors prevails.

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COMMENTARY ON

# Art. 266 DEBA

A commentary by Arnaud Constantin

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**F. Provisional distributions**

**Art. 266**

[1] Provisional distributions may be made as soon as the deadline for contesting the schedule of claims has expired.

[2] Article 263 applies *mutatis mutandis*.

# CONTENT

## I. GENERAL

Art. 266 DEBA allows for an exception to the rule that the distribution of funds takes place as soon as the assets and liabilities have been definitively determined (Art. 261 DEBA in conjunction with Art. 83 OAOF). It authorizes proceed with one or more provisional distributions of the proceeds of the bankruptcy as soon as the deadline for challenging the statement of claims has expired (Art. 250 DEBA), including in the event of pending legal action. This article allows certain claims to be extinguished in whole or in part by **early distribution** before the final distribution, before the closure of the bankruptcy proceedings, and before the establishment of the final distribution table within the meaning of Art. 83 OAOF. Since August 1, 2021, it even applies in the case of bankruptcy liquidated by summary proceedings following the repeal of Art. 96(c) OAOF, which until then prohibited the bankruptcy office from making provisional distributions in such cases. 1

The fact that the statement of claims has become final for all claims is not decisive. Before the right to disputed claims is known, holders of claims that are **definitively admitted** to the statement of claims may thus receive their share of the expected dividend. Creditors are free to accept the early distribution or to wait for the final distribution. 2

Creditors whose claims have not yet been admitted or are disputed are not entitled to a provisional distribution before the order of priority is determined. According to Art. 82 para. 2 OAOF, the bankruptcy administration does not proceed with the immediate provisional distribution of dividends relating to disputed claims or claims subject to a condition precedent or an uncertain term (Art. 264 para. 3 DEBA ). This article also applies when only the ranking of the claim is disputed. The same applies to claims on which a final decision has not yet been made and to late submissions, which are nevertheless taken into account if they are made before the provisional distribution has taken place (Art. 251 para. 3 DEBA ; Art. 82 para. 2, 2$^{nd}$ sentence OAOF). Dividends relating to a claim secured by a pledge abroad and which are not included in the bankruptcy estate opened in Switzerland are retained until the pledge is realized abroad and will only be paid to the creditor to the extent that the claim remains uncovered after such realization (Art. 62 OAOF). The amounts corresponding to the above-mentioned claims are retained and deposited by the bankruptcy administration for subsequent distribution and bear 3 interest (cf. Art. 209 LP). If the status of the claim changes before the final distribution, for example if a condition precedent is fulfilled, this may be taken into account in subsequent provisional distributions.

4 Art. 266 DEBA only mentions a **temporal condition** for determining when a provisional distribution is possible. Such a distribution can only be considered once the composition of the list of claims is sufficiently precise to assess the prospects of a distribution of funds (N. 1). Case law and doctrine have developed two additional conditions.

5 First, provisional distribution is subject to **compliance with Art. 220 LP**. Within the same class, creditors must be treated equally. They thus receive an advance payment at the same percentage (Art. 220 para. 1 DEBA ; principle of equality of creditors in the same class). Preferential creditors must be paid in full before creditors in the third class receive a partial dividend (Art. 220 para. 2 DEBA ).

6 Secondly, the above-mentioned payments and advance payments require that the bankruptcy estate has **sufficient funds available** to avoid compromising the final distribution. Simple estimates of future income and expenditure are not sufficient, as the administration of the bankruptcy must be based on the actual proceeds from the sale of assets already realized. The provisional distribution must be calculated in such a way that the payment of the estate's debts, any other estate costs and procedural costs within the meaning of Art. 262 DEBA and claims secured by pledge are covered, even if these costs arise at a later date. The costs of the provisional distribution must also be covered by the proceeds of the sale, which must be sufficient to allow a provisional dividend to be paid. This is generally the case when a property encumbered with a lien is sold. However, the proceeds from the pledged assets may only be used to cover the costs of inventory, administration, and realization of the pledge (Art. 262 para. 2 DEBA ). They may not be used to satisfy unsecured creditors. Any remaining amount will be transferred to the general liquidation account.

## II. PROCEDURE

7 There is **no obligation** to distribute an interim dividend. The decision is left to the discretion of the competent body.

The bankruptcy administration is **competent to** make interim distributions. It is also competent to refuse to pay the interim dividend, for example by invoking set-off against one of the creditors. It is also competent to demand the repayment of any surplus interim dividend unduly paid to creditors, including bringing an action for restitution when the amount overpaid is known. The bankruptcy administration is liable if the missing amount cannot be recovered (Art. 5 LP). The second creditors' meeting or a subsequent meeting is convened after the statement of claims has been filed (Art. 252 para. 1 LP) and also has the sovereign power to order one or more provisional distributions (Art. 253 para. 2 LP). In this scenario, the amount of the provisional distribution will be determined by the bankruptcy administration. If it has been established and the provisional distribution falls within its remit, the supervisory commission has the authority to order the provisional distribution (Art. 237 para. 3 no. 5 LP). The creditors' meeting may withdraw this authority from the supervisory commission, as the supervisory commission does not have independent authority to carry out the provisional distribution (see Art. 237 para. 3 LP). In the latter case, and where no supervisory commission has been set up, the authority to order provisional distribution lies with the bankruptcy administration and the second creditors' meeting. 8

Before proceeding with each provisional distribution, the bankruptcy administration draws up a **provisional distribution table**, which remains on file at the office for ten days (Art. 263 para. 1 LP applicable by reference from Art. 266 para. 2 LP; Art. 82 para. 1, 1st sentence OAOF; cf. Art. 231 para. 3 no. 4 LP, according to which it is not necessary to file the distribution table in the case of summary liquidation). Notice of this filing shall be given to the creditors by sending each of them an extract relating to their dividend (Art. 263 para. 2 LP; Art. 266 para. 2 LP; Art. 82 para. 1, 2nd sentence OAOF). 9

The **entry into force of the provisional distribution table** is a prerequisite for the distribution of funds (see N. 4). Before distributing the proceeds of the bankruptcy among the creditors, the bankruptcy administration must ensure that no complaints relating to the distribution table have been sent to the supervisory authority within the legal time limit of ten days (Art. 88, 1st sentence OAOF). It shall wait until the complaints have been settled before proceeding with the distribution (Art. 88, 2nd sentence OAOF). However, it may already pay out provisional dividends that are not the subject of any dispute, given 10 that the provisional distribution table is partially enforceable with regard to these distributions.

11 Art. 150 LP applies by reference to Art. 264 para. 2 LP, so that the same rules as those relating to the seizure procedure apply to the **return of the title** to the claim. The bankruptcy administration would be well advised to require these titles to be sent in advance before proceeding with provisional distributions.

## III. COMPLAINT (ART. 17 LP)

12 The provisional distribution table and the decision to proceed with a provisional distribution may be appealed to the supervisory authority within **ten days** of the date on which the complainant became aware of the measure (Art. 17 LP). The starting point of the time limit is, in principle, the day on which the creditor receives the notification provided for in Art. 263 para. 2 LP and Art. 82 para. 1 OAOF (N. 9). Provisional distributions made without a provisional distribution table are also subject to complaints (Art. 17 LP in conjunction with Art. 241 LP), in which case the *dies a quo* of the ten-day period starts from the date on which the measure becomes known. A complaint directed solely against the final distribution table with a view to challenging the provisional distribution table is late and therefore inadmissible.

13 According to the rules in connection with Art. 17 LP, the **creditor(s)** has/have the **right to lodge a complaint**. The creditor who has filed his claim or the creditor of the estate has an interest worthy of protection in opposing a provisional distribution if he considers that the bankruptcy dividend to which he is entitled is threatened. However, they lose their practical and current interest in filing a complaint as soon as they have been fully repaid.

14 Insofar as, subject to their right to be consulted on the submissions (Art. 244, 2nd sentence LP; OK-Constantin, Art. 265 LP N. 12), the law does not provide for the participation of the **bankrupt debtor** in the procedure for verifying and ranking claims, his legal position is not affected by the fact that a dividend is paid in advance to a creditor as part of a provisional distribution within the meaning of Art. 266 LP. In the absence of a legally protected interest, the debtor does not, in principle, have standing to bring a complaint and, if he does so, the complaint will be declared inadmissible. An interest only exists if the bankrupt debtor claims that the total proceeds of the realizations exceed

the total amount of the claims collated, with the result that the payment to certain creditors, by way of provisional distribution, of amounts to which they would not be entitled would jeopardize the payment of the liquidation surplus in his favor.

The **grounds** for filing a complaint are the same as those that can be invoked 15
against the final distribution table. Where applicable, the complainant may invoke a violation of Art. 82 OAOF if the bankruptcy administration proceeds with a provisional distribution without first establishing a provisional distribution table (N. 12). If the debtor is entitled to file a complaint (N. 14), his grievances are limited exclusively to the fact that the distribution table does not correspond to the state of collocation and that the circumstances allowing for a subsequent modification of a state of collocation in force are not met. The debtor is not entitled to raise substantive legal issues relating to the existence and amount of the claims entered in the provisional distribution table.

The complaint procedure is **free of charge** (Art. 20a para. 2 no. 5 LP; Art. 61 16
para. 2 let. a OELP) and no costs are awarded (Art. 62 para. 2 OELP).

The question of whether the **supervisory authority** to which a complaint 17
has been submitted within the meaning of Art. 17 LP has the **power to carry out a provisional distribution** in place of the bankruptcy administration is controversial. Some authors consider that this is not the case, given the right to self-determination and the sovereign power of the second creditors' meeting (Art. 253 para. 2 LP) and the risk of setting excessively high advance payments if the supervisory authority does not have sufficient information compared to the bankruptcy administration. Jeandin, for his part, considers that other bodies may decide on the provisional distribution. I agree with the latter author, emphasizing that the supervisory authority may proceed with a provisional distribution provided that it respects the principle of prudence and has sufficient information to determine the amount of the provisional dividends in order to avoid jeopardizing the final distribution.

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COMMENTARY ON

# Art. 267 DEBA

A commentary by Arnaud Constantin

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**G. Claims not filed**

**Art. 267**

The claims of those creditors who have not participated in the bankruptcy proceedings are subject to the same restrictions as those for which an unpaid debt certificate has been issued.

# CONTENT

## I. RATIO LEGIS

Creditors who did not participate in the bankruptcy proceedings do not receive a certificate of insolvency (OK-Constantin, Art. 265 LP N. 2). However, the absence or failure to file in the bankruptcy does not give them any advantage under Art. 267 LP. The **purpose** of the rule is to encourage creditors to file their claims in the bankruptcy and not to attempt to escape its negative effects (OK-Constantin, Art. 265 LP N. 22 ff.). 1

Art. 267 LP also establishes a certain **equality of treatment** between creditors who have filed their claims in the bankruptcy proceedings and those who have failed to do so (whether through negligence or wilfully), those who have filed their claims late and those who have been excluded from the proceedings. The aim is to prevent late or unregistered claims from being given priority over claims that have been duly filed in the bankruptcy proceedings and for which a certificate of insolvency has been issued due to insufficient liquidation proceeds. 2

## II. SCOPE

Art. 267 LP regulates the fate of claims **arising before or during bankruptcy**, but for which **no certificate of insolvency** has been issued due to the creditor's failure to participate in the bankruptcy proceedings. It only applies if the bankruptcy proceedings have been closed, whether they were liquidated in the ordinary form (Art. 221 ff. LP) or summary form (Art. 231 LP), and if the creditors who filed their claims themselves suffered a loss attested by a certificate of insolvency (Art. 265 LP in conjunction with Art. 96 let. c OAOF; cf. N. 1; OK-Constantin, Art. 265 LP N. 2). 3

This applies to any claim that could have been filed during the bankruptcy proceedings and that is likely to be included in the liabilities within the meaning of **Art. 197 and 208 ff. LP**. This also applies to claims for services other than the payment of a sum of money, given that they are converted into claims of equivalent value in accordance with Art. 211 para. 1 LP. Public law claims, such as claims by a compensation fund or tax claims, are also covered. 4

Art. 267 LP applies **provided that** the former bankrupt person remains the debtor of the claim after the bankruptcy proceedings have been closed, which 5 presupposes that their legal personality survives. This is not the case for a legal entity that is automatically removed from the commercial register when the bankruptcy is closed by court order (Art. 159a para. 1 let. b ORC). Nor does the status of debtor pass to heirs who have renounced the inheritance (Art. 566 ff CC; cf. also OK-Constantin, Art. 265a LP N. 2). In the latter case, the heirs or successors are not liable for the shortfall and Art. 267 LP does not apply (cf. OK-Constantin, Art. 265a LP N. 2 *i.f.*).

6 Art. 267 LP refers in particular to claims that have **not been lodged** within the time limit specified in Art. 232 para. 2 no. 2 LP or that have been lodged late within the meaning of Art. 251 LP, as well as claims that have been **withdrawn** by the creditor or that have been lodged but whose **ranking has been refused**. The material existence of the claim is not affected by the absence of participation in the bankruptcy proceedings or by the rejection of a submission; the creditor simply does not have the right to take part in the distribution of funds in the bankruptcy proceedings at the rank that would be assigned to them. The Federal Court recently confirmed that creditors who did not participate in the bankruptcy proceedings but who received a **certificate of insolvency after seizure** prior to those proceedings are also subject to Art. 267 LP. Thus, a creditor who has been issued a certificate of insolvency after seizure may file their claim in the subsequent bankruptcy of their debtor and obtain a certificate of insolvency after bankruptcy, or, if they do not file it, retain the certificate of insolvency after seizure, which will be subject to Art. 267 LP.

7 A **pledgee** who holds assets of the bankrupt debtor and who has not made them available to the office in accordance with Art. 232 para. 2 ch. 4 LP forfeits their preferential rights. If they have not participated in the bankruptcy proceedings, their claim, which no longer enjoys a privilege, also falls within the scope of Art. 267 LP. If the pledgee's preferential right is maintained, for example if the failure to make the assets available is excusable (Art. 232 para. 2 no. 4 LP), Art. 269 LP relating to assets discovered after the closure of the bankruptcy allows the creditor to retain their preferential right. In this case, the pledgee may initiate proceedings for the realization of the pledge, provided that the pledge has not been liquidated in the bankruptcy. The uncovered surplus will fall under Art. 267 LP due to non-participation in the bankruptcy.

8 Creditors whose claims arose after the commencement of bankruptcy proceedings, creditors who have a right of claim (to be asserted within the mean-

ing of art. 242 LP) and creditors in a bankruptcy suspended due to lack of assets (art. 230 LP; see OK-Constantin, Art. 265 LP N. 5). Art. 267 LP also does not apply when bankruptcy is revoked (Art. 195 LP; OK-Constantin, Art. 265a LP N. 13). The costs of proceedings within the meaning of Art. 262 LP are claims of the estate, which do not fall within the scope of Art. 267 LP and are not collated (cf. OK-Constantin, Art. 265 LP N. 5).

## III. EFFECTS

Creditors who do not participate in the bankruptcy have not taken part in the distribution of funds and cannot claim a bankruptcy dividend. In accordance with Art. 267 LP, their claims are **treated in the same way** as those for which a certificate of insolvency after bankruptcy has been issued. 9

The claims concerned are subject to the **same restrictions** as those for which a certificate of insolvency after bankruptcy exists. The restrictions also apply to claims for which there is a certificate of insolvency after seizure. These claims no longer bear interest (Art. 209 para. 1 LP); the absence of interest is enforceable by the debtor in all circumstances. The continuation of the proceedings is also conditional on the debtor's return to better fortune (Art. 265 and 265a LP; see OK-Constantin, Art. 265 LP N. 6 and 22 ff.). If the debtor's financial situation has improved, the creditor may initiate proceedings for the entire claim and not only for the dividend that he would have received in the bankruptcy (OK-Constantin, Art. 265 LP N. 1). 10

While the effects are similar in terms of restrictions, the advantages conferred by the certificate of insolvency apply only to creditors who participated in the bankruptcy proceedings. The fact that there is no certificate of insolvency for claims covered by Art. 267 LP prevents their holder from requesting a **seizure** within the meaning of Art. 271 para. 1 no. 5 LP (cf. OK-Constantin, Art. 265 LP N. 9). Nor can the creditor request the assignment in his favor of a **revocation claim** within the meaning of Art. 285 para. 2 no. 2 LP (cf. OK-Constantin, Art. 265 LP N. 20) or participate in the distribution of the proceeds from the realization of assets discovered after the closure of the bankruptcy proceedings (Art. 269 LP). 11

Claims covered by Art. 267 LP are not subject to the **statute of limitations** of twenty years from the date of issue of the certificate of insolvency (Art. 149a para. 1 LP applicable by reference to Art. 265 para. 2, 1$^{st}$ sentence LP; OK- 12

Constantin, Art. 265 LP N. 8) . They are subject to the “ordinary” limitation periods, in particular those set out in Art. 127 and 128 CO. Where a claim submitted in good time by the creditor has been rejected, with the result that the creditor has not received a certificate of insolvency, the limitation period is interrupted by the intervention in the bankruptcy proceedings. According to Art. 138 para. 3 CO, the limitation period in this case begins to run again from the moment when it is possible to assert the claim again. The acquisition of the limitation period is one of the grounds for the cancellation of a certificate of insolvency, in particular if such a certificate was issued after seizure and the creditor did not participate in the bankruptcy proceedings. The Federal Supreme Court recently confirmed that, in the latter case, Art. 267 LP does not allow for the deduction of a right to the cancellation of certificates of insolvency after seizure for claims not filed in bankruptcy. Such certificates do not have to be deleted if they have not been the subject of a certificate of insolvency after bankruptcy (see also OK-Constantin, Art. 265 LP N. 4 and 10).

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