



Attachments of TANGIBLE MOVABLE PROPERTY

Professional E-note

Since the requirements of an enforcement measure are met, the creditor requests the judicial officer to proceed to the enforcement against the debtor's assets.

The debtor's movable assets, claims and other property rights and his real property can be subject to enforcement.

According to the German Code of Civil Procedure [ZPO], the term “**movables**” covers:

- Movable assets,
- Claims and
- Other rights.

• Attachment of goods

1. GENERAL PROVISIONS (SECTIONS 803-807 ZPO)

According to section 803-1: “*The attachment of goods against movable assets is performed by **levy of attachment.***”

According to section 803-2: “*The attachment of goods should not be extended more than strictly necessary for the complete payment of both the creditor's claim and the costs of the enforcement measures*”. As a consequence, the judicial officer cannot proceed to excessive diligences of seizure, even if he does not need another enforcement title to do so. He should only attach movable assets which value is sufficient to cover the payment of the creditor's claim and the judicial officer's fees.

According to section 132-8 of the Professional Directive for Judicial Officers (GVGA), the judicial officer is in charge of evaluating the value of the movable assets' attached. It may happen that the estimated value is later evaluated at a lower price. In such a case, as the full satisfaction of the creditor is no longer granted, the judicial officer shall proceed to another **levy of attachment** ex officio (section 132 no. 9 of the GVGA).

On the contrary, a levy of attachment shall not be performed if no profit could be made from the assets: Section 803-2 “*The levy of attachment shall cease if the complementary fees for the enforcement measure cannot be covered by the resale of the attached goods.*”





Attachments of TANGIBLE MOVABLE PROPERTY

Professional E-note

2. ATTACHMENT OF GOODS-MOVABLE ASSETS (SECTIONS 808-827)

JURISDICTION OF THE JUDICIAL OFFICER

Section 808-1 “*The levy of attachment of movable assets, which are in debtor’s possession, is proceeded by the repossession performed by the judicial officer.*” Pursuant to this section, the judicial official is competent for the levy of attachment of movable assets.

The movable assets may only be attached if they are “*in possession*”:

- of the debtor (section 808),
- of the creditor (section 809),
- or a third party, who accepts to surrender them (section 809).

By the expression “in possession”, it should be understood that the asset is effectively in the possession of either the debtor, the creditor or of a third party. Besides, it should be noted that the assets, which are in possession of a third party, can only be attached with his prior consent (“... a **third party who agrees to surrender them**”). This consent concerns both the approval to surrender and the resale of the assets. Thus, the sole agreement of the attachment is not sufficient to proceed.

By his declaration of consent to surrender and resale, the third party loses, at the same time, his **right of action in opposition to the enforcement of a judgement** (section 771: “*If a third party argues that he has a right which prevents from the alienation of the movable asset, his opposition to the attachment of goods should be brought before the court of the district where the enforcement measure should take place.*”).

PAYMENT IN INSTALMENTS

When the judicial officer arrives at the debtor’s residence, he requests the debtor to make a voluntary payment which is the last request before enforcement. Besides, section 806b provides that “(2) *In case the debtor’s goods cannot be attached, but the debtor credibly assures that he will pay the debt at short notice in instalments, the judicial officer shall collect the instalments if the creditor accepts this agreement.*”

The judicial officer is empowered to allow the debtor to pay in instalments and is responsible for ensuring that the enforcement procedure is brought to a timely and effective conclusion.

He can recover the instalments for the payment of the debt, when the goods are exempted, and when the creditor agrees with this payment in instalments.





Attachments of TANGIBLE MOVABLE PROPERTY

Professional E-note

The creditor's enforcement order shall result from section 754: the judicial officer is consequently authorised to receive payments or other goods and to deliver to the debtor, provided he has satisfied his obligation, the title with the enforceable mention.

With regard to the debtor or a third party, the judicial officer's authority to proceed to the enforcement is presumed by the possession of the enforceable copy of the title (section 755).

This enforceable copy of the title shall be delivered to the debtor with the receipt of the full payment (Section 757 I).

THE PROCESS OF THE LEVY OF ATTACHMENT

According to section 808, the levy of attachment shall be performed by the **appropriation** of the assets by the judicial officer. In this sense, the appropriation means an **identification** of the levy of attachment, this identification is preceded by the removal of the assets or by the affixing of seals or a pledge notification, if the objects are left in the custody of the debtor (section 808 II 2). With regard to the removed assets, the judicial officer shall acquire possession as a bailee.

Section 758-a mentions the limits of the enforcement negotiations. Pursuant to that article "*(1) The debtor's residence [...] should not be searched without the latter's consent, excepted with an order from the magistrate of the district court where the search should be performed. This section is not applicable if the order granted by the judge would endanger the success of the search.*

(4) The judicial officer shall not proceed to enforcement in residences during the night and on Sundays and bank holidays if it will cause an undue hardship for the debtor (and the joint custodian of the house) or if the expected success would be in disproportion with the intervention, excepted if the judicial officer has an order from the magistrate of the district court. Night time means the hours from 9 p.m. to 6 a.m."

Consequently, enforcement should only take place in residences at night and on Sundays and bank holidays provided the judicial official has received a special order from the competent magistrate.

With regard to the place of enforcement, the judicial officer can proceed anywhere within the scope of his local competence.

Indeed, it must be noted that, pursuant to section 758a III, persons who have joint custody of the debtor's residence must give their approval prior to the search.

Then, the judicial officer should draft a **report of proceedings** mentioning all the measures implemented (section 762 I), which must contain the following information (section 762 II):

- Place and time of the report;





Attachments of TANGIBLE MOVABLE PROPERTY

Professional E-note

- Object of the enforcement negotiation, briefly mentioning the proceedings implemented by the judicial officer;
- the names of the persons with whom negotiations have been carried out;
- the signature of these persons and the written mention proving that the report has been read and approved before signing;
- the signature of the judicial officer.

In addition, the judicial officer must report all the demands and other communications that occurred during the proceedings (section 763). In addition, the judicial officer must also report the estimated value of the attached goods (section 132 no. 8 GVGA).

An important step in the levy of attachment is the notification of the **debtor** about the enforcement if the latter was not present during the proceeding (section 808 III “*the judicial officer must inform the debtor of the levy of attachment that has been performed*”). The notification shall be made by delivery of a copy of the report to the debtor (section 135 no. 5 GVGA). A copy of the report should only be given to the **creditor** if he requests it or if he must be informed of such decision, pursuant to section 108a GVGA (such as debtor’s claims on third party) (section 135 no. 5a GVGA).

THE EXEMPTED GOODS

The restrictions on attachment generally aim to protect the debtor. Section 811 lists the exempted goods that the judicial officer must respect ex officio. In fact, the debtor and his family should keep the minimum requested for subsistence: the judicial officer is prevented from seizing goods which are compulsory for his personal needs or his professional activity.

Exempted goods include:

- goods necessary for personal use or for the household (clothing, linen, beds...);
- a four week supply of food, heating and lighting materials, or the amount of money required to obtain them;
- animals which are required for feeding the debtor and his family and the required food supplies for feeding these animals;
- goods which are compulsory for professional activity;
- paid out earned income;
- (...)

Section 811 II “(2) A good listed in paragraph 1 no. 1, 4, 5 to 7 may be seized if the seller enforces on the basis of a pecuniary claim secured by reservation of title on the sale. The agreement of reservation of title must be proved by documents.” Pursuant to this article, there is no prohibition of levy of attachment if the creditor has delivered to the debtor a good (listed in no. 1, 4, 5-7) under reservation of title and if this reservation of title is proved by relevant documents.





Attachments of TANGIBLE MOVABLE PROPERTY

Professional E-note

THE SEIZURE AND THE RIGHT OF PLEDGE OF THE CREDITOR

The seizure and right of pledge of the creditor are main provisions of the German enforcement law.

Section 804 I (1) specifies that: “ *By the levy of attachment, the creditor is granted of a right of pledge on the attached good.*” As a result, the creditor obtains, by the attachment, a **security pledge** on the good. Furthermore, the attachment proceeds to the **impounding** of the good.

The impounding means that the debtor can no longer exert any private rights on the attached goods (sale, rental...). Through penal protection, the importance of the impounding, which aims to protect the creditor, is reinforced (section 136 I of the German Penal Code [StGB] - Rescue of a attached goods, breaking of official seals “(1) *Anyone who destroys, damages or renders non-useable, fully or partly, a good which is attached or impounded for official purposes shall be punished by a prison sentence of maximum one year or a fine.*”)

Pursuant to section 804 III(2) “*The right of pledge grants the creditor with the same rights as the other creditors have obtained by an agreement [...]*”.

It has to be noted that the pledge granted previously, thanks to a first levy of attachment, has priority over subsequent attachments.

By way of the right of the pledge, the creditor shall be entitled to use of the attached goods in order to obtain payment of the claim referred in the enforcement title (example: to proceed to the sale of the attached goods).

• The enforcement on accounts and other property rights

The enforcement on receivable accounts and other property rights includes the enforcement on paid out earned income. The tribunal is competent to proceed to the enforcement receivable accounts and other property rights (other than movables properties) (section 828 “(1) *The judicial acts which implies the enforcement on receivable accounts and other property rights shall be performed by the competent tribunal for enforcement*”).





Attachments of TANGIBLE MOVABLE PROPERTY

Professional E-note

• The enforcement measure aiming to obtain the restitution of goods or the obtaining of acts and abstention

The German Code of Civil Procedure [ZPO] regulates in [paragraph 3](#) the [enforcement measures that aimed to obtain the restitution of goods and acts or abstention to act](#):

- Restitution or provision of items (sections 883-886)
- Effect of acts or abstention to act (sections 887-893)
- Sworn statement of assets (sections 894-898)

The restitution is carried out through coercion by the judicial officer (section 883 I: “(1) *If the debtor must surrender movable goods or an amount of certain movable goods, they should be **removed** from his possession by the judicial officer and delivered to the creditor.*”).

The restitution concerns the following items:

- Restitution of a **movable item** (section 883 I);
- Restitution of an **amount of certain movable items** (section 883 I);
- Restitution of property or ships (section 885)
- Restitution of a **certain amount of fungible items or securities** (section 884, which refers to section 883 I)

It should be pointed out that the restitution may also be made to third parties. As a consequence, it is the **removal**, and not the **delivery** to the creditor, which characterises the restitution.

If all of the conditions of enforcement are met, pursuant to section 883 I, the good to be shall be seized by the judicial officer and delivered to the creditor for restitution.

If the good is not found, it should be proceed pursuant to section 883 II “ *the debtor is obliged, upon request by the creditor, to sworn statement of assets to confirm that he does not own the good and also that he does not know where the good is.*”





Attachments of TANGIBLE MOVABLE PROPERTY

Professional E-note

• Sworn statement of assets

One of the judicial officer's main missions is the receipt of sworn statement of assets. If the creditor has not received full satisfaction from the attachment and realisation, the debtor can be obliged, on application from the creditor, to provide the judicial officer with a sworn statement of his assets.

The procedure of sworn statement of assets is provided by paragraph 4-8th book and the debtor's obligations are described in sections 807, 836 and 883. This concerns the "oath of disclosure" and correspondingly contains the debtor's disclosure obligations.

As mentioned previously, if the enforcement has been performed in vain, the creditor shall request a sworn statement of assets. In the scope of this procedure, the debtor is obliged **to list his assets and submit it**.

Furthermore, he must also state the transactions listed in section 807 II.

"2) The list of assets should also contain:

1. the debtor's **disposals against payment** performed to a related person during the last two years before the first deadline given for the delivery of the sworn statement (section 138 of the Insolvency Act);
 2. the **services free of charge** performed by the debtor in the last four years before the first deadline given for the delivery of the sworn statement, provided they are not occasional gift and of minimal value.
- Goods which, pursuant to section 811 paragraph 1 no. 1, 2 are clearly not subject to the levy of attachment, do not need to be stated in the list of assets, unless a seizure of replacement could be performed."

The judicial officer of the district court where the debtor lives or, in case of lack of residence, where he stays, is competent to receive the sworn statement of assets (section 899 I).

The creditor shall take an appointment with the judicial officer for the sworn statement of assets. The latter shall ensure that the debtor is invited to such appointment (section 900 I 2).

With regard to the delivery of the sworn statement of assets, it should be checked that, in addition to the general and particular conditions of the enforcement, the particular conditions for the duty of disclosure are fulfilled.

Section 807 provides that the debtor must present a list of his assets in 4 cases:

- 1. the attachment has not led to the full satisfaction of the creditor,
- 2. the creditor states, with probable causes, that he may not be able to receive full payment by the attachment,
- 3. the debtor has refused the search (section 758) or
- 4. the judicial officer has tried, several times, to meet the debtor at his residence, after prior notice given two weeks in advance; this provision is not applicable if the debtor duly justified his absence.





Attachments of TANGIBLE MOVABLE PROPERTY

Professional E-note

Section 836 III provides another situation requesting the sworn statement of assets of the debtor “(3) *The debtor is obliged to disclose to the creditor the information requested for the enforcement of the claim and to submit him the relevant documents concerning the claim. If the debtor does not provide the information, he shall be obliged, at the creditor’s request, to state it in a report and confirm it in a sworn statement. The disclosure of the documents could be obtained by the creditor thanks to enforcement.*”

Finally, as mentioned hereabove, section 883 II states : Section 883 II “(2) *If the good to be returned is not found, the debtor is obliged, upon request by the creditor, to report it in a sworn statement in order to confirm that he does not possess the good and that he does not know where the good is.*”

If the debtor does **not attend** the appointment for the delivery of the sworn statement or if he **refuses** its delivery without reason, the tribunal must, upon request (section 901), issue a warrant of arrest for the enforcement of the delivery. The warrant of arrest will thus not be made ex officio and requires a request. The debtor’s arrest shall be carried out by the judicial officer (section 909 I 1). The custody shall not exceed a duration of six months (section 913).

- May 2012 -

For further information, please contact eje@europe-eje.eu

The EJE project is cofinanced by the European Union



Sole liability for this document rests with the author

The Commission is not responsible for any use that may be made of the information contained therein.

