

Enforcement of Foreign Judgments

Contributing editor
Patrick Doris



2018

GETTING THE
DEAL THROUGH

GETTING THE
DEAL THROUGH 

Enforcement of Foreign Judgments 2018

Contributing editor

Patrick Doris

Gibson, Dunn & Crutcher LLP

Publisher
Gideon Robertson
gideon.roberton@lbresearch.com

Subscriptions
Sophie Pallier
subscriptions@gettingthedealthrough.com

Senior business development managers
Alan Lee
alan.lee@gettingthedealthrough.com

Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com



Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3708 4199
Fax: +44 20 7229 6910

© Law Business Research Ltd 2017
No photocopying without a CLA licence.
First published 2012
Seventh edition
ISSN 2048-464X

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. The information provided was verified between August and September 2017. Be advised that this is a developing area.

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



CONTENTS

Austria	5	Mexico	70
Katharina Kitzberger and Stefan Weber Weber & Co Rechtsanwälte GmbH		Fernando Pérez Correa Camarena Solórzano, Carvajal, González y Pérez Correa, SC	
Bermuda	11	Nigeria	74
Delroy B Duncan Trott & Duncan Limited		Etigwe Uwa SAN, Adeyinka Aderemi and Chinasa Unaegbunam Streamsowers & Köhn	
Cayman Islands	16	Panama	79
Jalil Asif QC and Pamela Mitchell Kobre & Kim		Jose Carrizo Morgan & Morgan	
Chile	20	Philippines	82
Francisco Aninat and Jorge Bofill Bofill Escobar Abogados		Ricardo Ma PG Ongkiko, Anthony RV Jacoba and Trisha Beverly C Flores SyCip Salazar Hernandez & Gatmaitan	
France	25	Spain	87
Anke Sprengel EBA Endrös-Baum Associés		Marco de Benito and José María Fernández de la Mela IE Law School	
Germany	32	Switzerland	92
Christoph Wagner Heuking Kühn Lüer Wojtek PartGmbH		Dieter A Hofmann and Oliver M Kunz Walder Wyss Ltd	
Greece	38	Turkey	98
Ioanna Lagoumidou Ioanna Lagoumidou & Associates		Pelin Baysal and Beril Yayla Sapan Gün + Partners	
India	44	United Arab Emirates	103
Namita Chadha and Sakshi Arora Chadha & Co		Hassan Arab and Sara Koleilat-Aranjo Al Tamimi & Company	
Indonesia	48	United Kingdom	108
Pheo M Hutabarat, Asido M Panjaitan and Yuris Hakim Hutabarat Halim & Rekan		Patrick Doris, Rebecca Sambrook and Samirah Haujee Gibson, Dunn & Crutcher LLP	
Ireland	53	United States	117
Julie Murphy-O'Connor and Gearoid Carey Matheson		Scott A Edelman, Perlette Michèle Jura, Miguel Loza Jr and Nathaniel L Bach Gibson, Dunn & Crutcher LLP	
Japan	60	Venezuela	122
Masanobu Hara and Misa Takahashi TMI Associates		Carlos Dominguez-Hernandez Hoet Pelaez Castillo & Duque	
Korea	65		
Woo Young Choi, Sang Bong Lee and Ji Yun Seok Hwang Mok Park PC			

Switzerland

Dieter A Hofmann and Oliver M Kunz

Walder Wyss Ltd

1 Treaties

Is your country party to any bilateral or multilateral treaties for the reciprocal recognition and enforcement of foreign judgments? What is the country's approach to entering into these treaties and what, if any, amendments or reservations has your country made to such treaties?

Switzerland is party to a number of bilateral and multilateral treaties governing the recognition and enforcement of foreign judgments.

In practice, the most relevant multilateral treaty is the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the Lugano Convention, 30 October 2007), entered into by Switzerland and the European Union as well as Denmark, Norway and Iceland. The Lugano Convention entered into force on 1 January 2011 and replaced the former Lugano Convention of 1988, which was in force in Switzerland from 1992 to 2010. The Lugano Convention is, in essence, the equivalent of the Brussels I Regulation of 2001 (Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters). In this context, it should be noted that the Lugano Convention has not been amended to mirror the changes made to the Brussels I Regulation by the recast Brussels I Regulation, which took effect in January 2015, and there are no plans to amend the Lugano Convention.

Moreover, Switzerland is party to a number of bilateral treaties on recognition and enforcement in civil and commercial matters, in particular, with Germany, Austria, Belgium, Spain, Italy, Liechtenstein, (the former) Czechoslovakia and Sweden.

Generally speaking, Switzerland has traditionally been cautious about entering into treaties on the recognition and enforcement of foreign judgments, particularly in the interest of protecting the position of parties having their domicile or seat in Switzerland. This approach has changed under the Lugano Convention, which provides for broad recognition and enforcement of judgments rendered in a member state of the European Union (including Denmark), Norway or Iceland in Switzerland.

Where there are no applicable treaties, the recognition and enforcement of foreign judgments is governed by the Swiss Private International Law Act (PILA).

2 Intra-state variations

Is there uniformity in the law on the enforcement of foreign judgments among different jurisdictions within the country?

Yes, there is uniformity in the law in this regard throughout Switzerland. Up until 31 December 2010, Switzerland had as many as 26 different codes of civil procedure (ie, one in each canton). As a result, the procedure of enforcement of foreign judgments differed depending on where enforcement was sought.

As of 1 January 2011, the procedural landscape completely changed; the unified Swiss (federal) Code of Civil Procedure (CCP) entered into force. As a consequence, all enforcement proceedings are now governed by federal law (ie, the CCP and the Debt Collection and Bankruptcy Code (DCBC)).

While the law on procedure is thus uniform, one should bear in mind that the CCP is relatively new, and it will take some time to build a

uniform practice throughout the country. Moreover, the judicial organisation of the cantonal courts is regulated by cantonal, not federal, law. In addition, the language in which the proceedings are conducted (and in which all pleadings need to be made and all written briefs and exhibits need to be filed) depends on what the official language of the court's district is (German, French or Italian). Consequently, the practice of enforcement may still differ from canton to canton.

3 Sources of law

What are the sources of law regarding the enforcement of foreign judgments?

Sources of law are the applicable international treaty, if any (in particular, the Lugano Convention; see question 1) and statutory law (in particular, the PILA, the CCP and the DCBC). Case law is relevant only for the interpretation of the statutes; it may not overrule legislation.

4 Hague Convention requirements

To the extent the enforcing country is a signatory of the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, will the court require strict compliance with its provisions before recognising a foreign judgment?

Switzerland is not a signatory of the Hague Convention. It is unclear whether Switzerland will become a signatory.

5 Limitation periods

What is the limitation period for enforcement of a foreign judgment? When does it commence to run? In what circumstances would the enforcing court consider the statute of limitations of the foreign jurisdiction?

Limitation periods are traditionally considered to be an issue of substantive, not procedural, law under Swiss law. There is no specific limitation period for the enforcement of foreign judgments. In essence, a foreign judgment can be enforced in Switzerland as long as it is enforceable in the country where it was rendered (both under the Lugano Convention and under the PILA).

If the law of the country where the judgment was rendered provides for a limitation period for the enforcement of the judgment as such and this period has lapsed, Swiss courts are likely to consider the foreign judgment as non-enforceable.

In addition, the debtor may invoke the exception that the substantive claim that was awarded in the foreign judgment has become time-barred after the judgment was rendered under the (substantive) law which governs the claim.

6 Types of enforceable order

Which remedies ordered by a foreign court are enforceable in your jurisdiction?

The Lugano Convention does not limit the remedies that can be enforced. Any remedy ordered by a foreign court of a Convention member state can therefore be enforced in Switzerland (with the exception of remedies that would be in manifest contradiction to Swiss public

order; see question 19). In particular, orders for specific performance can be enforced in Switzerland regardless of whether the defendant was ordered to do something, to refrain from doing something or to tolerate something. Not only final judgments but also interim injunctions are enforceable under the Lugano Convention.

The situation is different under the PILA (which applies where the Lugano Convention is not applicable): the prevailing view is that, under the PILA, a judgment must be final to be enforceable, so that interim injunctions are not enforceable.

While foreign interim injunctions are, in principle, enforceable under the Lugano Convention, their enforceability can raise complex issues in practice, and there are certain rules developed by the case law of the Court of Justice of the European Union (CJEU) to be respected, in particular the CJEU's decisions in *Van Uden* (Case C-391/95, 17 November 1998) and *Mietz* (Case C-99/96, 27 April 1999). As a result, it is generally more difficult to enforce foreign interim injunctions than a final judgment. Moreover, for practical reasons, it may often be the better route to apply for interim injunctions under Swiss law (directly in Switzerland) than to attempt to enforce a foreign interim injunction.

7 Competent courts

Must cases seeking enforcement of foreign judgments be brought in a particular court?

Generally, a request for enforcement must be filed with the cantonal enforcement court. Since the organisation of the cantonal courts is subject to cantonal law (see question 2), the actual title of the competent court may vary from canton to canton. As a rule, enforcement proceedings are conducted by a single judge or by the president of a district court.

Enforcement can generally be sought in the district in which the debtor is domiciled or has its seat, as well as in the district where enforcement measures are to be taken (eg, where the assets to be frozen are located). In contrast to the law in force up to the end of 2010, Swiss courts may issue freezing orders with effect throughout Switzerland (provided that some assets, or the domicile or seat of the debtor, are within the court's own district).

8 Separation of recognition and enforcement

To what extent is the process for obtaining judicial recognition of a foreign judgment separate from the process for enforcement?

Generally, recognition takes place incidentally in other proceedings (ie, even without having initiated specific recognition proceedings); in particular, foreign judgments may be recognised within enforcement proceedings.

Enforcement, on the other hand, requires that a Swiss court has declared the foreign judgment enforceable. As shown below, however, Swiss courts have traditionally accepted that Swiss enforcement proceedings for money claims under the DCBC can be initiated even before a foreign judgment has been declared enforceable in separate proceedings. This applies even within the scope of the Lugano Convention, which would actually provide for a specific procedure to be followed in order to declare a foreign judgment enforceable.

9 Defences

Can a defendant raise merits-based defences to liability or to the scope of the award entered in the foreign jurisdiction, or is the defendant limited to more narrow grounds for challenging a foreign judgment?

A defendant cannot raise merits-based defences to liability or to the scope of the foreign judgment.

Under the Lugano Convention, there is no room for a review of the merits of a foreign judgment. In practice, enforcement of a foreign judgment can only be prevented if a manifest violation of the public order of Switzerland can be established or if the judgment conflicts with an earlier judgment on the same subject and between the same parties (see questions 19 and 20).

The situation is similar under the PILA. There are, in principle, no merits-based defences subject to public order issues (see question 11).

10 Injunctive relief

May a party obtain injunctive relief to prevent foreign judgment enforcement proceedings in your jurisdiction?

It is disputed whether and under which conditions the debtor may obtain injunctive relief against enforcement proceedings or a declaratory judgment confirming the non-enforceability of a particular judgment in Switzerland. Much depends on the specific circumstances of the case. Alternatively, one might also consider filing a 'protective letter' as a pre-emptive measure against a looming freezing request regarding certain assets. Such a 'protective letter' is usually in effect for six months, but can be extended. However, the practical impact of a 'protective letter' is rather limited.

11 Basic requirements for recognition

What are the basic mandatory requirements for recognition of a foreign judgment?

Under the Lugano Convention, a foreign judgment (from a Convention member state) is declared enforceable if the formal requirements of article 53 are met (article 41, Lugano Convention). The party seeking the declaration of enforceability therefore needs to produce the following documents:

- a judgment (given by a court of a member state and falling within the scope of application of the Lugano Convention), to be provided in original or in an authentic copy (article 53, Lugano Convention); and
- the standard form of Annex V satisfying the requirements of article 54 of the Lugano Convention or other documents proving the enforceability of the judgment in the state of origin. In this context, it should be noted that the judgment need not be final in the country of origin (see question 6); it is sufficient that the judgment is enforceable under the laws of the country of origin. Where the enforceability is subject to a security to be provided by the creditor, evidence needs to be provided that such a condition has been met.

In contrast to the old Lugano Convention (in force in Switzerland until 31 December 2010; see question 1), there is no need to provide evidence that the judgment was served on the defendant (see article 47(1), Lugano Convention 1988).

It may be necessary to provide additional documents if the judgment was given in default of appearance of the defendant. In such a case, it must be shown that the defendant was duly served with the documents that instituted the proceedings or with an equivalent document showing that he or she was enabled to arrange for his or her defence (article 34(2), Lugano Convention; see also question 16).

The court can require a translation of the relevant documents in the official language of the place where the enforcement proceedings will take place (ie, German, French or Italian). Such translations need to be certified by a person qualified to do so in one of the member states of the Lugano Convention (article 55(2), Lugano Convention).

In the first stage of the enforcement proceedings, the foreign judgment is declared enforceable without any review under articles 34 and 35 of the Lugano Convention. Even a judgment violating Swiss public policy could therefore be declared enforceable. In this stage of the proceedings, the party against which enforcement is sought is not entitled to file any submission on the enforcement application (article 41, Lugano Convention).

In the second stage of the enforcement proceedings (the appellate proceedings) the defendant may, however, raise one or more of the very limited grounds specified in articles 34 and 35 of the Lugano Convention (see question 9). In particular, he or she may claim that the recognition and enforcement would be manifestly contrary to Swiss public policy (see question 19), that he or she was not able to arrange for his or her defence (see question 16), that enforcing the judgment would be irreconcilable with an earlier judgment between the same parties in Switzerland (the state where enforcement is sought) or with an earlier judgment given in another member state (see question 20), or that the judgment was given in violation of an exclusive jurisdiction under the Lugano Convention (article 35, Lugano Convention).

Additional arguments may be raised by the defendant where enforcement is sought for a judgment that is not yet final (article 46, Lugano Convention). In this context, article 46(2) of the Lugano

Convention provides for special rules as to judgments that were given in Ireland or the United Kingdom. In this case, any form of appeal available in the state of origin is treated as an 'ordinary' appeal for the purposes of this article. Accordingly, the Swiss proceedings may be stayed if the deadline for filing an appeal in the UK or in Ireland has not yet expired or if such an appeal has been lodged (without regard to the nature of such an appeal). This particularity often requires special confirmation as to whether additional appeals might be available in the UK or in Ireland against the judgment.

In general, there are only a few cases where arguments under articles 34 and 35 of the Lugano Convention were successfully raised.

Outside the scope of the Lugano Convention, a judgment can be recognised under the PILA if the following (cumulative) conditions are met:

- the foreign court had jurisdiction under the rules of the PILA (see questions 14 and 15);
- the foreign judgment is final (ie, no ordinary appeal can be filed against the foreign judgment) (see question 6);
- the foreign judgment is not obviously irreconcilable with the Swiss public order (see question 19);
- the defendant was properly served or has accepted the jurisdiction of the foreign court (see question 16);
- the procedure leading to the judgment did not violate basic principles of Swiss law, in particular, the defendant was able to exercise its right to be heard; and
- the dispute has not first been pending in Switzerland or has not first been decided by a Swiss court or by a court in a third country the judgment of which could be recognised in Switzerland (see question 20).

Apart from these limited grounds for refusing enforcement of a foreign judgment, there are no further grounds for review (articles 25 and 27, PILA).

12 Other factors

May other non-mandatory factors for recognition of a foreign judgment be considered and if so what factors?

The factors to be considered for recognition and enforcement of a foreign judgment are exhaustively set forth in the Lugano Convention (or other treaties, if applicable; see question 1) and the PILA respectively. There are no additional non-mandatory factors to be taken into account. In particular, reciprocity is not a condition.

13 Procedural equivalence

Is there a requirement that the judicial proceedings where the judgment was entered correspond to due process in your jurisdiction, and if so, how is that requirement evaluated?

The foreign judicial proceedings in which the foreign judgment was rendered do not need to be equivalent to Swiss standards.

Only severe violations of due process (amounting to a violation of fundamental principles of Swiss procedural law or violations of the right to be heard) would be an obstacle to the enforcement of a foreign judgment (see question 19).

In a case where the foreign judgment was given in default of appearance of the defendant, it is necessary that the document instituting the proceedings was duly served on the defendant (see question 16).

14 Personal jurisdiction

Will the enforcing court examine whether the court where the judgment was entered had personal jurisdiction over the defendant, and if so, how is that requirement met?

Under the Lugano Convention, Swiss courts are not entitled to review whether the court of a member state of the Lugano Convention had jurisdiction over the defendant, irrespective of whether this court had based its jurisdiction on the Lugano Convention or on its own national law. The Lugano Convention allows for a review of jurisdiction in very limited instances only, for instance, in insurance and consumer cases or where exclusive jurisdiction rules as set forth by article 22 of the Lugano Convention were not complied with.

Judgments from countries other than Lugano Convention member states can, on the other hand, only be recognised and enforced if the foreign court had jurisdiction over the defendant pursuant to the rules set out in the PILA (see question 11).

Under the PILA, the jurisdiction of the foreign court is deemed given if the foreign court's jurisdiction was based on a valid jurisdiction agreement or if the defendant proceeded to the merits without objecting to the jurisdiction. In addition, a foreign decision relating to the law of obligations (eg, commercial matters) is recognised in Switzerland if it was rendered in the state of the defendant's domicile or his or her habitual residence, insofar as the claims relate to an activity carried out in such a state (article 149, PILA), whereby 'domicile' refers to the state where the defendant resides with the intent of establishing permanent residence (article 20(1)(a), PILA), while 'habitual residence' refers to the place where the defendant lives during a certain period of time, even if this period initially appears to be of a limited duration (article 20(1)(b), PILA). For companies, the registered office is equivalent to domicile (article 21(1), PILA) and the company's registered office is located at a place designated in the by-laws or in the articles of association or where the company is in fact managed if no such place is designated (article 21(2), PILA).

15 Subject-matter jurisdiction

Will the enforcing court examine whether the court where the judgment was entered had subject-matter jurisdiction over the controversy, and if so, how is that requirement met?

As outlined in question 14, the Lugano Convention prohibits the review of the jurisdiction of a court in a member state.

For judgments that are outside the scope of application of the Lugano Convention, the provisions of the PILA apply. Accordingly, foreign decisions are recognised if the court had personal jurisdiction (see question 14) or in the following circumstances:

- in contractual matters – if the judgment was rendered in the state of performance (unless the defendant was domiciled in Switzerland);
- for claims arising out of the operation of a branch – if the decision was rendered at the location of such place of business;
- if the decision pertains to unjust enrichment – if it was rendered at a place where the act or the enrichment occurred (provided that the defendant was not domiciled in Switzerland);
- if the decision pertains to an obligation in tort – if it was rendered at a place where the harmful act or the result occurred (unless the defendant was domiciled in Switzerland);
- for claims under an employment contract – if it was either rendered at a place of the enterprise or at the place of work (provided that the employee was not domiciled in Switzerland); and
- for decisions relating to a consumer contract – if the decision was rendered at a consumer's domicile or a habitual residence and if additional requirements are met.

As can be seen from the above, foreign judgments are, as a rule, only recognised and enforced if the foreign court had a specific and close connection to the dispute and if the defendant was not domiciled in Switzerland. Accordingly, in order to be able to enforce a claim against a resident in Switzerland, one must usually bring an action in Switzerland or in another European country.

16 Service

Must the defendant have been technically or formally served with notice of the original action in the foreign jurisdiction, or is actual notice sufficient? How much notice is usually considered sufficient?

In principle, the defendant must have been formally served in compliance with all applicable rules (in particular, the Hague Convention on the Service of Judicial Documents Abroad). Actual notice of the foreign proceedings is not sufficient (unless the defendant has accepted the jurisdiction of the foreign court).

In the case of a judgment given in default of appearance of the defendant, even minor formal shortcomings in service may make it impossible to have the resulting judgment enforced in Switzerland if enforcement is sought under the PILA. Under the Lugano Convention,

the position is less strict. Rather than referring to a formal test, article 34(2), Lugano Convention only requires original service on the defendant to have been effected 'in sufficient time and in such a way as to enable him or her to arrange for his or her defence'. In contrast to most countries, the defendant may in Switzerland raise the objection that he or she was not timely served even if he or she could have challenged the original judgment (article 34(2), Lugano Convention). This is because Switzerland declared a reservation in this regard. Consequently, a default judgment cannot be enforced in Switzerland if the defendant was not timely served in the first place, even if he or she could have appealed against the decision in the country of origin. This needs to be taken into account early on in the proceedings; the claimant should make sure that the defendant was properly served.

Switzerland takes a very formal stance on proper service. Service of judicial documents in connection with foreign proceedings on parties in Switzerland must be done in strict accordance with the Hague Convention. Service in Switzerland also requires translation of the document to the official language of the place where service is to be performed (ie, German, French or Italian).

Any attempt to serve parties in Switzerland in non-compliance with the Hague Convention is, from a Swiss law point of view, invalid and will make it impossible or at least difficult to have a resulting judgment enforced in Switzerland. In addition, such an attempt may constitute a criminal offence under article 271 of the Swiss Penal Code ('blocking statute').

17 Fairness of foreign jurisdiction

Will the court consider the relative inconvenience of the foreign jurisdiction to the defendant as a basis for declining to enforce a foreign judgment?

Inconvenience of the foreign jurisdiction to the defendant is not a basis for declining to enforce a foreign judgment. The issue is whether the foreign court had jurisdiction (see questions 14 and 15). If it had jurisdiction, the foreign judgment is to be recognised and enforced, regardless of whether the foreign jurisdiction was inconvenient for any reason whatsoever.

18 Vitiating by fraud

Will the court examine the foreign judgment for allegations of fraud upon the defendant or the court?

In general, no. Both under the Lugano Convention and national law, the foreign judgment will not be examined as to allegations of fraud as such. If, however, fraud amounts to a manifest violation of Swiss public policy, it may become relevant under the Lugano Convention as well as under the PILA (see question 19).

19 Public policy

Will the court examine the foreign judgment for consistency with the enforcing jurisdiction's public policy and substantive laws?

Violation of Swiss public policy is a ground for refusal of recognition and enforcement under the Lugano Convention (article 34(1)) as well as under national law (in particular, article 27, PILA). A further review of the foreign decision is excluded, with the exceptions outlined in questions 14, 15 and 20, as well as with regard to proper service (see question 16).

The concept of 'public order' is, similar to other jurisdictions, relatively vague. One important aspect of public policy is the fairness of the foreign proceedings (in particular, that the parties had ample opportunity to present their case). In addition to the formal requirements to be met by the foreign decision, there are also material restrictions as to the content of the foreign judgment. In particular, Swiss courts have consistently refused to enforce punitive damages awarded by foreign judgments, based on the argument that such damages would be contrary to Swiss public order (see also question 24).

Apart from these limited exceptions, the foreign judgment cannot be reviewed as to its substance. Accordingly, consistency with the substantive laws of Switzerland is, in general, not required and the Swiss court is not entitled to examine the foreign judgment in this regard.

Update and trends

The Federal Council intends to facilitate the recognition of foreign bankruptcy decrees by amending the PILA. In this context, the Federal Council also suggests introducing a new provision that would allow to enforce foreign decisions in avoidance (claw-back) matters (article 174c, draft PILA) provided that (i) the judgement was rendered in or is enforceable in the country where the bankruptcy proceedings were opened; (ii) the foreign bankruptcy has been declared enforceable in Switzerland; and (iii) the defendant was not domiciled in Switzerland. The respective draft of the Federal Council was published in May 2017. It will now be discussed in Parliament and will probably not enter into force before 2018.

20 Conflicting decisions

What will the court do if the foreign judgment sought to be enforced is in conflict with another final and conclusive judgment involving the same parties or parties in privity?

A judgment from a Lugano Convention member state cannot be recognised and enforced in Switzerland if it is in conflict with an earlier judgment in the same cause of action and between the same parties, provided that this earlier judgment could be recognised in Switzerland (article 34(4), Lugano Convention).

The same applies for judgments from jurisdictions other than Lugano Convention member states (ie, under the PILA). Here, in addition, recognition of a decision must also be denied if the dispute between the same parties and with respect to the same subject matter is pending before a Swiss court. In other words, the Swiss court does not need to have rendered its decision yet in order to prevent enforcement of a foreign judgment. By initiating Swiss proceedings, one may therefore prevent the recognition or enforcement of a foreign award in the same matter.

21 Enforcement against third parties

Will a court apply the principles of agency or alter ego to enforce a judgment against a party other than the named judgment debtor?

Enforcement of a judgment against a party other than the named judgment debtor (or its assignors or successors) is possible under exceptional circumstances only. Third-party assets, namely, assets formally held by a third party, may be subject to a freezing order and eventually seized if a prima facie case can be made that they actually belong to the judgment debtor and that relying on the third-party ownership would be abusive or that the third-party ownership is fraudulently alleged.

22 Alternative dispute resolution

What will the court do if the parties had an enforceable agreement to use alternative dispute resolution, and the defendant argues that this requirement was not followed by the party seeking to enforce?

Under the Lugano Convention, non-compliance with an agreement to use alternative dispute resolution (ADR) does not constitute a reason for not enforcing a foreign judgment.

Under the PILA, it would depend on the nature of the ADR agreement and the circumstances. In the case of a valid agreement to arbitrate, a Swiss court is likely to deny enforceability of a state court judgment.

23 Favourably treated jurisdictions

Are judgments from some foreign jurisdictions given greater deference than judgments from others? If so, why?

While the enforcement process for judgments from Lugano Convention member states may be simpler, no greater deference is generally given to judgments from certain jurisdictions.

24 Alteration of awards

Will a court ever recognise only part of a judgment, or alter or limit the damage award?

A Swiss court may decide to declare only a part of the foreign judgment enforceable. Article 48 of the Lugano Convention provides that judgments given in respect of several matters do not need to be enforced entirely. Enforceability can be declared for one matter or more than one matter. In addition, an applicant may confine his or her request on the declaration of enforceability of only parts of the judgment (article 48, Lugano Convention).

The same applies under the PILA. In particular, a foreign judgment awarding punitive damages can be enforced only insofar as damages would also be compensated under Swiss law. Accordingly, the enforcement of a judgment also awarding punitive damages is not entirely excluded in Switzerland even if enforcing the full award would constitute a violation of Swiss public policy (see question 19).

25 Currency, interest, costs

In recognising a foreign judgment, does the court convert the damage award to local currency and take into account such factors as interest and court costs and exchange controls? If interest claims are allowed, which law governs the rate of interest?

The foreign judgment is not altered and the rate of interest is entirely governed by the foreign judgment (or the law applicable on the merits).

For technical reasons, the Swiss enforcement system (under the DCBC) requires the creditor to convert the claim into Swiss currency when he or she seeks enforcement. However, such conversion does not alter the fact that the debtor is, in principle, liable to pay the requested amount in the currency in which the claim was awarded.

As to foreign exchange controls, the situation is more complex. The PILA allows the taking into consideration of foreign provisions that are mandatorily applicable. Depending on the circumstances, such exchange control regulations may therefore also be of relevance in enforcement proceedings.

26 Security

Is there a right to appeal from a judgment recognising or enforcing a foreign judgment? If so, what procedures, if any, are available to ensure the judgment will be enforceable against the defendant if and when it is affirmed?

Under the Lugano Convention, the decision to declare a foreign judgment enforceable may be appealed (article 43). The appellate court can refuse to enforce the foreign judgment only on one of the grounds specified in articles 34 and 35 of the Lugano Convention or if procedural requirements were not met.

Despite the fact that article 47(2) of the Lugano Convention provides for a right to proceed to protective measures as soon as the judgment has been declared enforceable, Swiss courts refuse to grant

freezing orders unless the applicant can provide prima facie evidence that there are assets in Switzerland that belong to the defendant. These requirements may have been somewhat lowered by the revised Lugano Convention, but the creditor is still required to specify the assets that should be frozen. If the applicant is not in a position to do so, no provisional measures will be granted. Accordingly, an applicant wishing to freeze certain assets would need to obtain evidence as to assets belonging to the defendant.

In general, the situation is similar under the PILA.

27 Enforcement process

Once a foreign judgment is recognised, what is the process for enforcing it in your jurisdiction?

Under Swiss law, there are basically two possibilities to declare a foreign judgment enforceable. First, there is the 'ordinary' route, as defined by the Lugano Convention itself (ie, requesting a separate declaration of enforceability). Second, a judgment (awarding a monetary claim) can also be declared enforceable within the framework of ordinary debt collection proceedings (more specifically, within the procedure to set aside the debtor's objection to the summons to pay). In the latter case, the proceedings are to a large extent governed by Swiss national law (rather than the Convention).

Generally, we believe that this alternative is being used more frequently in Switzerland than the 'ordinary' route as set forth by the Lugano Convention (and similarly by the PILA). One important reason for this is that the risk is limited; an unsuccessful attempt to enforce a judgment within these proceedings does not have a res judicata effect (while the situation is less clear under the Lugano Convention), so a creditor is not prevented from bringing the enforcement request again at a later stage. Additionally, this alternative can be faster (given that debt collection proceedings need to be initiated anyway at some stage and given that an appeal in the debt collection proceedings does not have suspensive effect).

The creditor can, of course, also choose to follow the path defined by the Lugano Convention, in which case the local enforcement process follows the declaration of enforceability.

For historical reasons, the enforcement process for money claims is different to the enforcement of other claims. Money claims are enforced in debt collection proceedings (which are initiated by requesting a summons to pay). If the debtor objects to the summons to pay, such an objection needs to be set aside in summary proceedings in which the debtor can raise very limited arguments only (such as payment of the debt, that the claim is time-barred or that the creditor agreed to a deferral of the payment date). Afterwards, and depending on the status of the debtor, the enforcement process is continued by the opening of bankruptcy proceedings or by the seizure of particular assets and the income of the debtor.

For other claims, the court declaring the foreign judgment enforceable would usually also determine how these claims are to be enforced.

walderwyss

Dieter A Hofmann
Oliver M Kunz

dieter.hofmann@walderwyss.com
oliver.kunz@walderwyss.com

Seefeldstrasse 123
8034 Zurich
Switzerland

Tel: +41 58 658 58 58
Fax: +41 58 658 59 59
www.walderwyss.com

Option to freeze assets

The request to declare the judgment enforceable can be combined with the request to freeze certain assets in Switzerland, be it during the proceedings in which the foreign judgement is being declared enforceable or after the judgment has been declared enforceable (see question 26).

28 Pitfalls**What are the most common pitfalls in seeking recognition or enforcement of a foreign judgment in your jurisdiction?**

Perhaps not the most common, but arguably the most dangerous, pitfall in seeking recognition and enforcement in Switzerland might be article 271 of the Swiss Penal Code (see question 16).

Getting the Deal Through

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Arbitration
Asset Recovery
Automotive
Aviation Finance & Leasing
Banking Regulation
Cartel Regulation
Class Actions
Commercial Contracts
Construction
Copyright
Corporate Governance
Corporate Immigration
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation

Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gas Regulation
Government Investigations
Healthcare Enforcement & Litigation
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Loans & Secured Financing
Mediation
Merger Control
Mergers & Acquisitions
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans

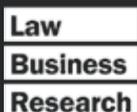
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Product Liability
Product Recall
Project Finance
Public-Private Partnerships
Public Procurement
Real Estate
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally



Online

www.gettingthedealthrough.com



Enforcement of Foreign Judgments
ISSN 2048-464X



THE QUEEN'S AWARDS
FOR ENTERPRISE:
2012



Official Partner of the Latin American
Corporate Counsel Association



Strategic Research Sponsor of the
ABA Section of International Law